

Nova Law Review

Volume 15, Issue 2

1991

Article 13

Transcript Of Proceedings

Transcript Of Proceedings

Abstract

MR. FRIEDMAN: Take your seats in the next minute or two, please, and we'll begin our program. This is the second panel of our program conference.

TRANSCRIPT OF PROCEEDINGS

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAW NATIONAL
SECURITY**

AND

**CENTER FOR NATIONAL SECURITY LAW,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW**

*** * ***

**A NATIONAL SECURITY CONFERENCE
STRENGTHENING THE RULE OF LAW
IN THE WAR AGAINST DRUGS AND
NARCO-TERRORISM**

*** * ***

Day One

Thursday, October 11, 1990, 8:35 a.m.

**International Center, 1800 K Street, N.W.,
Washington, D.C.**

The views expressed are those of the individual speakers and should not be attributed to the American Bar Association, the Standing Committee, the Center for National Security Law or the Nova Law Review.

** The following transcript is of selected portions of the proceeding.

- I. THE RULE OF LAW AS A TARGET 796
 Moderator: Richard Friedman, Chairman, ABA Advisory
 Committee on Law and National Security
 Speakers: Gabriela Tarazona-Sevillano, Visiting Professor of
 International Relations, Davidson College, Former
 Peruvian Prosecutor
 Bruce Zagaris, Oppenheimer, Wolff & Donnelly
 Rafael Perl, Specialist in International Narcotics Policy,
 Congressional Research Service, Library of Congress
- II. STRENGTHENING THE REGIME OF EXTRADITION 818
 Moderator: Monroe Leigh, Steptoe and Johnson
 Speakers: Mark M. Richard, Deputy Assistant Attorney General,
 Department of Justice
 John F. Murphy, Villanova University School of Law
 Joseph E. diGenova, Bishop, Cook, Purcell & Reynolds
 Luz Nagle, UCLA 1992 M.A. Candidate, Latin
 American Studies, District Judge, Republic of Colombia
- III. SEIZURE OF NARCO-TERRORISTS ABROAD 838
 Moderator: Joseph E. diGenova
 Speakers: William P. Barr, Deputy Attorney General, Department
 of Justice
 Abraham D. Sofaer, Hughes, Hubbard & Reed
 Andreas F. Lowenfeld, New York University School of
 Law

I. THE RULE OF LAW AS A TARGET

MR. FRIEDMAN: Take your seats in the next minute or two, please, and we'll begin our program. This is the second panel of our program conference. It's entitled "The Rule of Law as a Target," and a couple of logistic announcements, the first of which is that I regret that our speaker Monica de Greiff was unable to make her transportation connections today, and therefore she will not be with us. So that will give us ample time to ask questions and hear answers from the

panel. We've agreed among ourselves that we're going to save as much time as we can. We've imposed an arbitrary thirty second introduction rule so that will save us a few moments.

We're also going to be guided by the constraint of lunch. That's an action-forcing event so we're going to adjourn promptly at 12:25. We will have a few moments before we assume our seats at the tables which are being set in the back. Our order of speakers today will be Gabriela Tarazona-Sevillano, who will be followed by Bruce Zagaris, and then finally Rafael Perl. And when those twelve to fifteen minute presentations are concluded, then we'll have ample time for questions and answers, and once again, please use the microphone which is stationed at the center of the room.

Our first speaker today will be Gabriela Tarazona-Sevillano. She has a very distinguished history, and let me just mention a couple of highlights. To begin with, she is a native of Peru. She holds a juris doctorate from the University of Trujillo in Peru. She has served as Visiting Professor of International Studies at Davidson College. She has been a prosecutor in the province of Zarumilla, Peru, and she has published widely in the field of terrorism and narco-trafficking.

It's our pleasure to introduce our speaker.

DR. TARAZONA-SEVILLANO: I would like to concentrate on the case of Peru, and permit me to say that the war against drugs and narco-terrorism in the producing countries such as Peru is particularly complex. To simply criminalize all acts associated with the production and trafficking of drugs has proven to be insufficient. The people who decide to participate in any of the stages of the production and trafficking of cocaine believe that the possible gains, sometimes very meager, outweigh the risk and threat of the criminal sanction.

Beyond the legal aspects, there are a number of political, social and institutional factors linked to the problem of narco-terrorism that need to be explained to understand the acute contradictions of the moment. I will present a case study on Peru to illustrate this thesis. Peru enacted the first and oldest law in South America against drug trafficking, Law for the Repression of Illicit Traffic of Drugs in 1978. This law was inspired by the South American Accord on Narcotic Drugs and the Psychotropic Substances of 1973. It was not until six years later that other South American countries followed with laws on drugs: Venezuela in 1984, Colombia in 1986, Ecuador in 1987, and Bolivia in 1988. The Peruvian law was also the first one in South America to outlaw coca cultivation. Since 1980, Peru has been the seat of the most powerful and radical terrorist organization in Latin America, Sendero

Luminoso or the Shining Path. Adhering to the theories of Marx, Lenin and Mao, the insurgency is determined to overthrow Peru's existing socio economic . . . system and restructure the state with its unique interpretation of communism. Sendero Luminoso has allied with the Peruvian drug syndicate and controls the most important coca/cocaine paste producing area of the world, the Upper Huallaga Valley. Simultaneously, the Peruvian economy is passing through perhaps the most critical moment of its recent history. With inflation skyrocketing to 2,775 percent in 1989, legal and illegal segments of the population have turned to the "parallel exchange system" to buy American dollars to preserve, to some extent, the purchasing power of its money. Undoubtedly, the impact of drug money has been important.

Allow me to make a few observations about the social, political, institutional and legal factors that are present in the Peruvian case to help understand the complexity of the situation and the traditional basis of coca culture. The coca plant has played an important role in the lives of the Andean people of Peru, who have cultivated it for centuries. In those regions, the workday includes several breaks exclusively for coca chewing, and I think a '70s survey shows that fifteen percent of the Andean population of Peru chews coca daily. In 1980, the first large scale operation was mounted to eliminate coca cultivation. But let's talk about the legal and illegal coca. Coca can be legally grown, but only for ENACO, the state coca company that commercializes it for commercial purposes. The 1978 law outlaws all other coca cultivation.

In the Upper Huallaga Valley, a rain forest valley region to the northeastern Andes, coca was first introduced as part of the subsistence agriculture brought by the Andean colonists in the mid 1960s. The valley provided ideal conditions for the growing of the coca. The expansion of this crop was due to the inability of the state to provide technical assistance for farming rain forest soil and proper marketing of goods.

As I mentioned to you, in 1980 the first large scale operation was mounted to eliminate coca cultivation. It accomplished little. Government forces were ordered to confiscate land and destroy coca crops. Farmers and landowners were to be incarcerated. These measures proved almost entirely counter-productive. The mandate of the police was logistically impossible to fulfill and had the unexpected counter-effect of causing higher prices for black market coca leaves. By 1988, coca cultivation was estimated to incorporate 211,000 hectares in the Upper Huallaga Valley alone. This growth has led the valley to become

a major center of cocaine paste production. Sendero Luminoso penetrates the area. Sendero's presence in the Upper Huallaga dates from the early 1980s.

Police sources believe that it was Osmán Morote who established the region as Sendero's northeastern front in 1983-84. By 1985, Sendero had become an armed presence in the region. The movement of strength and support has continued to increase since then, filling the political vacuum long present in the Upper Huallaga region. Predictably, Sendero's visibility led to heightened military occupation of the area. A development that Sendero Luminoso has also exploited to its own advantage. The Peruvian government unwittingly fueled the growers' resentment by implementing programs designed to reduce or eradicate coca grown in the Upper Huallaga.

Simultaneously, a narcotics police unit was introduced. Known as umopar, this police force was immediately perceived by the local populace to be a threat, and it added considerably to their hostility toward the state. These programs undertaken in conjunction with the U.S. agencies have served only to aggravate the populace and augment perceptions of official ineptitude. In the eyes of the farmers, these regulations and programs are aimed at taking away their only means of survival, coca cultivation. The group that benefitted the most from the state's anti-narcotics initiatives was Sendero Luminoso. The government's programs provided insurgencies with the fortuitous opportunity to denounce the United States as the primary culprit for the growers' problems.

Sendero also contends that it protects the growers from exploitation by traffickers. The rebels provided support for farmers seeking to organize themselves against both the police and the traffickers. Organization has also made it possible for the growers to negotiate better prices for their coca leaves.

The narco-terrorist alliance.

Drug money shifts the balance of power. Each hectare of coca in the Upper Huallaga produces at least two metric tons of leaves annually. Growers sell each ton of leaves for processing into cocaine paste to middlemen for around \$600 (U.S.). The cocaesl of the valley encompass 211,000 hectares. Of these approximately 200,000 enter the illicit drug trade. Each metric ton of dry coca leaves yields twenty-one kilograms of cocaine paste. The paste is purchased by traffickers for \$890 per kilogram. These traffickers transport the past to hidden jungle labo-

ratories where it is refined into pure cocaine hydrochloride.

Approximately three kilograms of paste are required to produce one kilogram of pure cocaine. One metric ton of coca leaves is required to produce seven kilograms of cocaine. The finished product is then smuggled to the United States where it's sold to wholesalers in Miami for at least \$10,000 per kilogram. Will you please show figure three? This figure is for coca leaves and cocaine paste yield, an estimated wholesale value of \$28 billion for the Peruvian originated cocaine upon reaching the United States. According to these projections, it will yield revenues of approximately \$7.24 billion for the paste producers and local traffickers, and \$240 million for the growers who are cultivating coca.

Of course, there are a great many other expenses to be considered. Nevertheless, the gross amount of U.S. hard currency entering Peru through these illegitimate channels is equal to approximately twenty percent of the legitimate Peruvian GNP. Foreign exchange earnings from copper, Peru's largest legal export, pale in comparison comprising only 1.4 percent of the GNP. As of 1990, the Upper Huallaga ranks as the primary region of coca cultivation in the world. The massive influx of narco dollars has given the local traffickers unprecedented power and created abnormal activity in the region. Even the smallest of the towns in the coca region may boast several branch outlets of Lima's major banks. All are strategically placed to capitalize on the high volume of dollar transactions.

The estimated remaining \$20.52 billion generated by the sale of Peruvian originated cocaine remains in the hands of international traffickers. Why has this alliance proven so cohesive? Alliance benefits coca growers. Coca farmers initially associated with Sendero Luminoso for one fundamental reason: it was in their economic interest to do so. The Ministry of Interior indicates that there are 66,000 families cultivating coca in the Upper Huallaga. Assuming only two full harvests per year, a low yield, the average annual family earnings come to about \$3,636 U.S. dollars before expenses, a handsome sum compared to Peru's per capita income of \$1,470 according to the World Bank.

The insurgency has shrewdly won the farmer's confidence by easing their two primary burdens: the coca eradication programs activated by the government and exploitation from the traffickers and their intermediaries. Alliance benefits traffickers. It seems paradoxical that Sendero Luminoso will associate with the capitalist oriented traffickers. Nevertheless, a mutually beneficial alliance indeed exists. Sendero justifies its participation by explaining that narcotics contribute to the ero-

sion and demoralization of "Yankee imperialism". Sendero offers cocaine producers and traffickers three important benefits: discipline among the growers; protection from police and military interference; and the promise of further government destabilization.

Traffickers believe that because Sendero poses a far greater threat to Peru's national security than they do, Sendero provides them with a margin of freedom. They have also utilized the guerrillas to protect their many clandestine airstrips scattered throughout the region. An official from the Ministry of Interior has set the number of hidden airstrips at 168. Compounding the problem is the fact that the small aircraft traffic in the region is completely unregulated. The police do not have radar, and planes come and go at will. On the occasion when a police plane does sight a presumed trafficker's aircraft and orders it to land, the radio commands are generally answered by a derisive laughter.

Alliance benefits Sendero Luminoso.

Sendero, on the other hand, also benefits greatly from its association with the traffickers. Besides its commitment to undermining the United States through drugs, Sendero's presence in the valley has facilitated recruitment of thousands of new supporters and access to previously unavailable funds. Yet, Sendero Luminoso has done more than simply take possession of the territory. It has also won the hearts and the minds of the inhabitants. The Upper Huallaga may be counted as one of Sendero's greatest successes.

In some areas, Sendero has also branched economically into other fields. In some, for example, the rebels have become involved in currency exchange. This is the hard currency that is mainly exchanged in the streets of Lima named the parallel exchange system. The actual amount that Sendero receives for its services is obviously difficult to determine, but it's generally thought to range in the tens of millions of dollars annually.

Exactly what the movement does with these vast sums is unknown. Present power of the narco-terrorist alliance—will you please put number one again—the Upper Huallaga, in effect, has become a state within a state governed by Sendero and supported economically by the cocaine syndicate. The two groups working together have given rise to narco-terrorism. The informal governing system set up by the two groups in the Upper Huallaga has actually proven quite successful lending legitimacy to the eyes of the populace to two marginal social

groups who, in reality, are delinquents. On a trip along the major highway of the region, one now finds walls blanketed with revolutionary slogans, "Coca or Death," "Viva Presidente Gonsalo [sic]," "Out with the Junkies, Viva La Revolucion."

The ubiquitous hammer and sickle is frequently carved into the pavement itself. Many stretches of the highway itself has also been claimed and are controlled by Sendero Luminoso.

Government response in the Huallaga Valley.

Ironically, almost every attempt made by the government to undermine the narco-terrorist alliance has played directly into the hands of the narco-terrorists. The situation is further complicated by the state's refusal to acknowledge and address narco-terrorism as a single social, military and political entity. Instead of formulating a policy that will combat narco-terrorism as a whole, the government insists upon addressing narcotics and terrorism as separate elements.

Drug trafficking in Peru is fought by police forces. Terrorism, on the other hand, is considered a threat to the national security, and is therefore fought by the military. These two services are utterly uncooperative. As a result, the narco-terrorist alliance presently faces little tangible challenge from the Peruvian government. On May 31, 1987, 200 armed Sendero guerrillas stormed the civil guard station of Jauchisa [sic]. That's one of the towns in the Upper Huallaga. Many state officials have long feared these acts. The state was no longer the dominant power in the Upper Huallaga. As a result, an immediate state of emergency was declared in the department of San Martin. That's in the Upper Huallaga. Although it was Sendero initiative that actually led to its implementation, it was the police who were put in charge of the operation.

The government was attributing the source of the problem to the narcotics trade and not to the insurgency. For a short period of time, the police were able to establish order in the emergency region. Over the next few months the sales of coca leaves and cocaine paste slowed significantly. But the growers grew hostile towards the police, and with the help of Sendero Luminoso began to work against them. The police soon found themselves out-gunned and out-manned by the insurgency even though it was the traffickers that they had come to apprehend.

The government, alarmed by the state of total disorder in the Upper Huallaga, reacted by declaring the entire department of San Martin—it's equivalent to a state—under a state of emergency in early No-

vember, 1987. This time the operation was placed in the hands of the military, not the police. This policy change meant that the emphasis of the fighting had been shifted from narcotics to terrorism. Here, the complexities of fighting narco-terrorism are manifested as are the deleterious effects of such profound inter-service rivalries.

Despite a government implementation of a state of emergency in the region, Sendero Luminoso continued to grow in strength and the narco-terrorism phenomenon continued to spread. Sendero's strategy is rooted in the Maoist invisibility principle. Senderistas [sic] wear no uniforms, making them hard to distinguish from inhabitants of the area. They have no base camps giving the opposition no opportunity for debilitating counter-attacks, and they shy away from face-to-face fighting, preferring surprise attacks and bombings. In addition to this, the traffickers have used the corrosive influence of their wealth to further turn the armed forces against one another, a shrewd maneuver that even has led to one confrontation between umopar and army officers.

Military intervention.

Military intervention in the Upper Huallaga has had the effect of alienating the populace from the state. The people of the region, already hostile toward the government eradication programs and police occupation, are even more aggravated by the ominous shadow of the military as can be seen by complaints of military abuses filed with local district attorneys. Sendero Luminoso, in contrast, is well-positioned to manipulate the people's distrust of the state. The district attorney's office in the Upper Huallaga receives countless complaints of army abuses every day. Disappearances rank among the most frequently reported. Unfortunately, the state of emergency status subordinates the legal apparatus to the military command.

District attorneys are categorically denied access to areas that the military has defined as critical, and cooperation from police forces operating in the area is virtually non-existent. Thus, while Sendero Luminoso and the narcotic traffickers work together to achieve their goals, the forces of law and order are deadlocked in a senseless and counter-productive power struggle.

In conclusion, geo-political control of the region has been almost completely arrested from the Peruvian government. As a narcotic terrorist alliance has created what amounts to a state within a state, government officials now realize that the fight against narco-terrorism has been lost, largely because there are no comprehensive programs to

counter it. Narco-terrorism must be aggressively approached with a comprehensive strategy deserving serious multilateral solution. Importantly, an intensive, well-financed crop substitution program should be initiated in the Huallaga Valley. Anything short of this integrated aggressive approach is doomed to fail.

(Applause.)

MR. FRIEDMAN: Our second speaker is Bruce Zagaris. Very briefly, Bruce has had an outstanding educational background. I dare to say that he's the only one in the room among all of these lawyers who has three—count them three—master of laws degrees, one from Georgetown University, one from Stockholm University, and the other from the Free University of Brussels in 1976. He has also served in exotic places such as the faculty of law of the University of the West Indies. He currently is associated with the law firm in Washington, D.C. of Oppenheimer, Wolff & Donnelly, where he specializes in international legal affairs.

He is widely published in the area of international business law, and among other things he serves as editor of the *International Enforcement Law Reporter*, and for those of you who have not seen it, or are not acquainted with it, it's an outstanding publication. There is some literature regarding it on one of the back tables as you leave the room. It's our pleasure to introduce Bruce Zagaris.

MR. ZAGARIS: So pernicious and pervasive have become the problems of organized crime, their involvement in drugs, and the problems of organized crime, their involvement in drugs, and the problem of narco-terrorism, that the rule of law is indeed under assault and in dire need of protection. I have recently had occasion to look at this problem as a consultant for the United Nations Crime Prevention Committee late last year where I did a study on developing new modalities to combat new forms of international organized crime. The way I will address the problem today is to first look at the way in which law is under attack, and for discussion purposes, I will look first at international law that's under attack, and then look at national law that's under attack. Then I will look at some proposed solutions to the problem and I will first look from the macro-view at developing new regimes of international criminal cooperation by marrying international organization theory with public international law and criminal law, and then I will look at some more specific solutions.

Let's now turn to the rule of law under attack. International law is under attack in the fight against narcotics trafficking and organized crime because international law has not been as flexible and as dy-

namic as either organized criminals or the narco-terrorists. International law develops mechanisms only over time. Normally, for instance, it takes two to four years to negotiate a bilateral treaty, and it takes a far longer time to conclude a multilateral convention of the type that Irving Tragen at CICAD was discussing today. The absence of effective cooperation in extradition and mutual assistance in the fight against organized crime and narco-terrorists has resulted in the circumvention of international law.

Because international law is not effective, countries and governments tend to take shortcuts. For instance, the cases of *Alvarez Machain*, *Verdugo Urquidez*, and *Manuel Antonio Noriega* are notorious examples of this. In my opinion, the *Noriega* case was especially egregious because partly in order to arrest the narcotics trafficker, the U.S. used masses of troops in wholesale violence that resulted in the deaths of innocent civilians, wiped out neighborhoods and caused thousands of people to lose their businesses.

The case of *Alvarez Machain* is also important because the United States in that case did not even try to use the extradition treaty which exists between Mexico and the United States. Instead, in the case of *Alvarez Machain*, and for those of you who are not familiar, he was the medical doctor who is alleged to have participated in the torture of Mr. Camarena. In the case of *Alvarez Machain*, he was one of three people who had been brought back from Mexico by way of kidnapping. The United States did this in the face of diplomatic protests by the Mexican government, and as a result, the judge, Judge Raffertie, in the District Court of Los Angeles ruled that because of the protests by the Mexican government that court did not have jurisdiction to try the case. As a result, the case right now is on appeal to the Ninth Circuit.

This case is very important to persons who are interested in national security and the law, and the reason is because now the Mexican government has requested the extradition of the persons responsible for the kidnapping including Mr. Beterase [sic] who is a high level official for the Drug Enforcement Agency. It is quite probable if the United States does not succeed in extraditing those individuals and does not release Dr. Alvarez Machain that there will be a wave of kidnapping in the case of the U.S. officials involved. Indeed, as many of you remember, that was one of the ways that the *Jaffe* case was resolved. That case involved a kidnapping of Canadians by people in Florida, and in the end Canada started playing the same way, and after a while the governments resolved the case and basically agreed not to resort to kidnapping in the future.

Now if the United States democratic system, including its executive and judicial branches, cannot force the United States government to follow international law, especially extradition treaties, then I believe a wave of kidnappings will follow. And although the case of Mexico is important, what should concern those people who deal with U.S. national security is the threat from other countries. For instance, the government of Iran passed a law providing for extraterritorial jurisdiction and announced that they were going to apply it first against the captain of the U.S. vessel in the Persian Gulf when the Iranian airbus carrying civilians was shot down.

I think there is a severe threat to our national security from other countries unless there is more international law brought to the process of the way that governments arrest individuals wanted for crimes.

Another area in which the rule of law and especially international law is important, and it has been addressed by several people this morning, has to do with international drug policy. Many people in various countries including our country hear the policy of their national government, but they're not aware that there is actually an international policy. Indeed, Mr. Tragen referred to the United Nations multidisciplinary program, which the Organization of American States (OAS) has also adopted and has begun to follow.

Now this program has four major themes: one is the prevention and reduction of illicit demand; the second is control of supply; third is suppression of illicit trafficking; and the fourth is treatment and rehabilitation. Under each of these four categories, there are many specific targets. Unfortunately, some countries only want to follow one or two of these major program categories. What needs to be done is for the international community and for lawyers and bar associations to ensure that each of these program targets are being followed.

Another problem in the area of international law is that the international organizations which are charged with the policy and with the implementation of the policy do not have the resources to do their job. And here national governments including the United States government must pay the dues for which they are obligated. And if they don't pay their dues, then the inability of international organizations to undertake their obligations cannot be met. You may recall Rachel Ehrenfeld mentioned the fact that although there are many international laws, they are not being followed, and this is partly a problem of resources. Some of this problem is being dealt with. As Irving Tragen said, there are both new mechanisms such as the U.N. Drug Convention of 1988 and the series of declarations and new conventions of CI-

CAD of the OAS, and within these conventions there are new enforcement mechanisms. For instance, the 1988 U.N. Drug Convention provides at the end for the U.N. Drug Commission to monitor, report, and make suggestions on the improvement of the operation of that convention. I think what you'll see happening is that eventually the commission is going to start recommending that sanctions be taken against certain governments that are not following the law.

Another innovation in that convention, which I think is very helpful, is that governments can share the funds of confiscated assets. This is also a new legal initiative which has been pioneered by the United States in the '86 Anti-Drug Abuse Act, and which I think has been effectively used because that helps provide incentives for governments to cooperate in investigation of narco-terrorism and organized crime.

National laws have also been under attack, and I won't spend much time on that partly because of the time, but also partly because I think a number of speakers today such as the speaker before me have talked about the problems that many of the developing countries are faced with.

Another problem has been the overreaction by certain countries, and the fact that in overreacting countries, governments are trying to deny wholesale the rights of defendants. And in this regard, for instance, the confiscation of drug profits and the denial of effective assistance of counsel, in my mind, undermines the integrity of our legal system. In addition, another problem has been that in enacting money laundering laws, some countries have gone so fast that the accumulation of "know your customer," suspicious transactions, and criminalizing involvement by negligence, has resulted in wholesale deterioration of relationships between professionals such as bankers, lawyers, accountants and their clients.

Policymakers must be cautious in this realm because the rights of individuals in their confidential relations are also very important. Another factor which we are seeing right now in the United States is a downturn in foreign investment in the U.S. The statistics in the first quarter of the Bureau of Economic Affairs of the Department of Commerce have shown a downturn, and this is continuing even more in this quarter, and this is, in part, a result of the severe reporting requirements of the United States with respect to money movement in comparison with other countries.

To be effective in controlling money laundering, and it is very important to take the profit out of organized crime, narcotics trafficking, and especially out of narco-terrorism, the world community should act

multilaterally because if only one or a few countries act it, the organized criminals will simply use other countries. Let me now turn to mechanisms to counter organized crime developments and specifically narco-terrorism. I only have a few more minutes before I want to turn the mike over, and my task was basically to focus on the rule of law under attack. So I've focused on that rather than too much on solutions.

One solution, which I think is very important and which really hasn't been dealt with, and I think is especially useful for a group like this dealing with national security and the law, is that international organization theory can be used much more adeptly with public international law and international criminal law. Right now the law enforcement fight against organized criminals that are engaged in international narcotics crimes and narco-terrorism has really been confined for the most part to the nation-state, using the classical definition of the state centric paradigm in which only the nation-state is a chief actor in international relations.

The world community needs to go beyond that and to foster and enhance relationships between the nation state and international governmental organizations, on the one hand, such as the United Nations and Interpol and especially intergovernmental regional organizations such as the European Community, the Council of Europe, and CICAD. The academic and governmental communities must explore and improve these relationships, so that nation states have more means to combat organized criminals. In this regard, there is a need then to develop an international criminal cooperation regime, and to also look at developing subregimes such as the subregime of regulating illicit money movement. This involves utilizing several areas of the law and also several components of law enforcement both in our country and other countries tend to be compartmentalized and which require better integration.

With respect to other mechanisms, in my formal paper I have outlined about thirty different specific mechanisms, but in closing, let me focus mainly on the need to develop more direct enforcement mechanisms for international criminal cooperation. In this regard, recently there have been developments towards creating an international criminal court which would have jurisdiction over some of these illicit narcotics crimes. Although that is a long way away from happening universally, there is a much better chance that it will be implemented either regionally, especially in the Americas, or subregionally within, for instance, the Commonwealth Caribbean.

There is also a need for an international police constabulary force, and again, it won't happen internationally. It will first happen on a regional or subregional basis. I also think, and I wrote in 1986 a paper, which I had presented first to the Inter-American Juridical Committee, suggesting that there really needs to be a Council of the Americas' Crime Problems at an attorney general level which would meet daily to focus not just on problems of illicit narcotics or problems of terrorism or problems of arms trafficking, because all these criminal problems, as several speakers have said, are integrated.

This organization already has a model. It is the Council of Europe Committee on Crime Problems which has been functioning since the '50s and which has just in the last two months prepared and adopted through its committee of experts a new convention on laundering and searching, seizure and forfeiture of assets. And this organization, I think, has much for the Americas to emulate. And by doing that, governments will find solutions to these problems on a multilateral level and only if there is a solution on a multilateral level will this problem be solved.

In conclusion, let me just say that in the post-Cold War era, where the powers of major countries are becoming increasingly diffuse, the success of U.S. diplomacy, in particular its narcotics policy, will increasingly be determined not by force, but rather by adept ability to persuade other countries to innovatively design and implement new legal mechanisms. And with that, I thank you.

(Applause.)

MR. FRIEDMAN: The third and final presentation on this panel will be made by Rafael F. Perl. He is a specialist in international narcotics policy with the Congressional Research Service, which is, as you know, an arm of the United States Congress. He received a doctor of jurisprudence from Georgetown Law School. He's an author, an editor of numerous publications relating to international narcotics control, and let me name just a few of them, to give you a sense of the richness of his interest.

He has published the *Andean Drug Strategy and the Role of the U.S. Military*. Another publication is *Congress and International Narcotics Control*. He has also published *Narcotics Interdiction and the Use of the Military: Issues for Congressional Deliberation*, and also *Combating International Drug Cartels: Issues for U.S. Policy*. He has a very wide background in the area of development and policy, and we're very anxious to hear the remarks of Dr. Perl.

DR. PERL: Thank you very much. The title of today's panel is

"The rule of Law as a Target." And in my remarks I will focus on or highlight briefly six ways in which drug trafficking organizations and groups target the rule of law and impede its implementation, and then I will briefly add some personal comments and observations of my own on related issues. Drug trafficking organizations threaten the rule of law by the very multinational nature of their criminal operations. Bruce talked of the need for a multilateral or multinational solution or regime, and a multinationalization of criminal enterprises engaged in the drug trade and the methods that such groups employ. Methods outside of the law pose a major threat to the rule of law.

Never before in history have criminal groups or insurgent groups had access to such funding, such easily available funding on such a massive scale. Irv Tragen spoke of the drug trade generating somewhere in the neighborhood of income equal to that of the arms trade. Rachel Ehrenfeld spoke about income equal to that of the oil trade, and figures we've heard range between \$100 and \$500 billion a year. These staggering amounts of money in the international marketplace can buy the best in communications equipment, can buy the best in weaponry, can buy the best in transportation equipment, as well as the best intelligence information, political power and other support.

As Irv Tragen said, power comes from drug money. And where silver does not produce the desired results, lead and terror are routine. Take Colombia for an example. Drug trafficking organizations and groups do not respect international boundaries or borders. They do not respect the law. In contrast, democratic governments and their policymakers and particularly those who implement their policies are pledged exactly to do that, to respect the rule of law. And the drug trade, by its international character, poses major policy dilemmas for national policymakers intent on respecting the rule of law. Traffickers can with impunity fly across national borders. They can transfer money across national borders.

However, those who pursue them often have to follow cumbersome procedures. They have to stop at customs. They have to check in. They have to make arrangements. The law is often its worst enemy when offenses, procedures and remedies differ from country to country. And efforts at harmonization of laws and efforts to create cooperative mechanisms to combat drug trafficking, while often effective, nevertheless require the means to implement such measures.

Remember Rachel Ehrenfeld spoke about the need for training, to train people in the field. People must be trained, and funding has to be made available for hiring the personnel as well as training them. And

we have to keep in mind that law alone is not always an effective solution. The rule of law is stronger in some countries and weaker in others. Policymakers recognize that whereas the rule of law may not always prompt a foreign nation to enforce its laws, diplomatic or other pressure may. Drug trafficking organizations also target the rule of law by developing an economic and political base in the regions in which they operate. They generate income—what was the figure—\$240 million for Peru in 1988 for Peruvian growers, and they buy political support. Just look at the power of the farm lobby in the United States.

Well, the farmers in Peru have political clout, too. The traffickers also will support and fund high visibility public works projects. And they often find powerful allies and industries which seek to avoid excessive regulation: the arms industry, the chemical industry and the banking industry, just to name a few. Drug trafficking organizations also target the rule of law by violence, intimidation and terror. And differing legal systems and political systems and economic systems have differing abilities to withstand sustained violence, intimidation and terror. Such organizations and groups target the rule of law by seeking to exploit differing perceptions of the priorities nations should assign to combatting drug production, trafficking and use.

For some countries, and perhaps rightly so, the drug issue is a relatively unimportant one when compared to overall national problems of debt, unemployment and insurgency. And many also suggest that drug trafficking organizations target the rule of law by seeking to exploit differences of opinion over what type of drug related activities should be subject to criminal sanctions. Remember Gabriela spoke about traditional coca production and use in the Andes. And also by exploiting differences of opinion as to whether or not any criminal sanctions at all are appropriate, Bill Ratliff suggested examining the option at least as to whether or not marijuana should be legalized. In many countries, including the United States, such perceptions are often deeply rooted in moral values and intense feelings of nationalism.

And finally, drug trafficking organizations may target the rule of law by destroying the power of the state to control territory within its jurisdiction—the creation of a state within a state like the Upper Hualaga Valley—in some instances by destroying the state itself.

Now, before closing, I'd like to add a number of personal observations. The United Nations Anti-Trafficking Convention which comes into force and effect next month offers a vehicle to help individual states confront the international drug trade by internationalizing the means to fight it, and basically by providing a framework for interna-

tional cooperation. But there are a number of policies, general policy issues here, that still need to be resolved, and in my opinion the central policy issue or question underlying the success of the convention is to what degree will the major drug producing and transit and consuming nations be willing to diminish contacts and approaches on the bilateral level and substitute multilateral ones instead.

Now let's look at which countries have ratified the convention to date. There are some twenty or twenty-one such countries. Ratification by countries such as Uganda, India and Togo is, of course, very important. And important producing and transit countries such as Bolivia, Ecuador, Chile and Mexico have ratified as well. But aside from the United States, no major drug consuming nation has ratified the convention to date. Much more important than some of these other countries would be ratification by consuming nations such as the United Kingdom, Germany, France, and the Soviet Union, just to mention a few. And if this list of twenty or so countries, which have ratified or exceeded the convention to date, is any indication of enthusiasm to cooperate or levels of cooperation in the future, it would seem that prospects for an enhanced international effort to tackle the drug trade may not hold much promise.

In closing, I'd like to raise and address the issue of technology. In wars, very frequently, technology provides the leading and the winning edge. And one of the panels that we'll have tomorrow will be looking at what types of regimes and what types of solutions can we be looking towards in the future. I think it's very important to keep technology in mind as we examine these issues. As one begins to do more research into the causes of drug addiction, and what makes drugs addictive, one begins to acquire more information on how to make more addictive drugs. And I'm speaking about synthetic drugs, and I'm talking about the possibility—let me just throw out two scenarios, and they're not that farfetched—a synthetic drug, which is not necessarily very harmful to the health, which is unbelievably addictive, that everybody can manufacture. Our kids can manufacture it in the garage. What will this do to the whole order of the cartels and insurgent groups that generate their income or some of their income from this type of activity?

Or the other scenario. An equally addictive drug that I absolutely have to have if someone slips it to me by design, where the formula is a closely held secret, perhaps by a Pablo Escobar or a Muammar Qadhafi or a Fidel Castro or an Abu Abbas or a Yasir Arafat. And although these ideas and concepts are a little bit down the road, I believe that we will see this developing, more and more use of synthetics

and more and more use of very powerfully addictive drugs. And with that I'd like to end my comments.

(Applause.)

MR. FRIEDMAN: Thank you for all those presentations, and we're almost on schedule. We'll have about twenty minutes for a question and answer session, and I would ask those of you who have questions of our panelists to do two things. One, address the panel by using the microphone, which is located in the center of the room, and if you feel compelled to make an observation, make sure it's limited to an observation rather than a speech, and please define your questions. Sir.

MR. BOYLAN: Mr. Chairman, thank you. I'm Robert Boylan. I'm with the Department of Justice, and I have something that's going to turn into more than a question. It is an observation directed to Bruce Zagaris who has suggested that part of the attack on the international legal system might be coming from potential law enforcement community, and he referred specifically to the ruling out in California in the *Machain* case. I wanted to, first of all, observe that the extradition treaty with Mexico that was at issue here has, to my knowledge, not resulted ever in the surrender of a Mexican citizen to the United States for the purpose of prosecution here. At least, it has not in recent years.

I would also observe that the conduct that is complained of in that case, namely the alleged kidnapping, appears to be entirely consistent with United States law, as announced by the Supreme Court in the *Ker-Frisbee* line of cases, and if you take it by analogy, to the cases that authorize the Bank of Nova Scotia's subpoenas, and also to the cases that authorized discovery pursuant to our Federal Rules of Civil Procedure, as opposed to limiting discovery in international cases to being taken in accordance with the Hague Evidence Convention.

So that is, as I said, a comment, but it's a comment which is intended to focus on the commitment of the Department of Justice to acting in the international spirit in accordance with the rule of international law as we understand it. His solution for this alleged attack on the international legal system is the development of new and different kinds of mechanisms that would involve a multilateral approach, and I would caution that the International Law Commission has been studying for almost forty years the international criminal court that Mr. Zagaris referred to, and while we're talking, the criminals out there are doing stuff. We need to keep in mind that action needs to be taken, action consistent with law and consistent with the rule of international law, but we can't allow ourselves to be confused by the suggestion that multilateralism provides a solution to these very real problems.

MR. FRIEDMAN: Thank you for your observation. I don't know for purposes of conserving time whether a response is required, but if any of the panelists have a short response, please feel free to do so.

MR. ZAGARIS: Yes, I have a brief response. With respect to the fact that the extradition treaty has not successfully worked, that is correct. However, I think that before the United States or any other government resorts to extra-legal measures, they should at least exhaust all alternatives. In that case, there was no attempt by the United States to make a request for extradition, whereas the Mexican government in seeking the persons responsible for the kidnapping of Dr. Alvarez Machain has at least made an extradition request to which there has been not even an acknowledgement by the United States.

Although multilateral measures are important—an example is that although, as Rafael said, certain European governments have not signed the U.N. Drug Convention or have not ratified it—the European Community is a signatory and already the Council of Europe, which includes sixteen countries, has adopted a convention on money laundering and asset forfeiture to further implement the U.N. Drug Convention, another example of the potential and the immediate example of action by international organizations. I also think that despite this problem between Mexico and the United States, there have been attempts by the United States government that have been successful bilaterally with Mexico.

An example would be the February '89 bilateral narcotics agreement. Another example is the conclusion of a mutual legal assistance convention and so while I think multilateral solutions are important, it's also important to pursue bilateral ones.

MR. FRIEDMAN: Thank you. Sir, would you identify yourself and your association, if you could.

MR. EMERSON: I'm Terry Emerson, formerly counsel to Senator Barry Goldwater, and my question is addressed to Mr. Perl. Narcoterrorism is an area where the lines between what is foreign and what is domestic policy blurs. So it seems the Congress as well as the President has an important role to play in shaping answers to this problem. I wonder if you have any thoughts to share with us on how the two political branches might cooperate with each other in developing American initiatives to tackle the problem?

DR. PERL: First of all, I have to make clear these are my own personal thoughts, and I'm not talking on behalf of the organization that I work for. But just shooting from the hip, and I don't like to do that, but I will do that, I think it would be important to create some-

thing comparable to the Helsinki Commission by statute where you had members of Congress from key committees and members from the executive branch from key agencies to work together on a policy planning board to set national drug policy.

I think that would improve communication and unity of policy. I think it's important. Drugs are an extremely fragmented issue, an interdisciplinary issue. There are health aspects, national security aspects, agricultural aspects, all sorts of aspects, trade aspects, to the drug problem. And it gets fragmented. Policy gets fragmented in the Congress, and policy gets fragmented in the executive branch. Congress created in the executive branch an Office of National Drug Control Policy, not a real czar, but kind of a mini-czar, or some people say a "czar-deen."

(Laughter.)

DR. PERL: But if Congress, and I don't think this is realistic, but if Congress were to create a similar joint committee on drug policy, something comparable to the Joint Economic Atomic Energy Commission in the '50s, this would produce more centralization to policy. But I do not see this happening, so I think more coordination and communication, and I think some sort of a committee, where you have got key people in power positions on the Hill, drug power policy positions on the Hill, together with key people in drug power policy positions in the executive branch.

MR. FRIEDMAN: Sir, next question.

MR. HALL: My name is Chuck Hall. I'm with the Washington Office on Latin America, a non-profit public education and research organization. My question is for Ms. Tarazona-Sevillano, and it regards Peru. You stated that the Peruvian government has refused to combat narco-terrorism as a whole, preferring to separate issues of anti-narcotics from those of counter-insurgency. I'm not an expert on Peru, but it seems to me that there is some sense in separating these two. For example, you mentioned the alliance between Sendero Luminoso and drug traffickers. There is also some aspect, as I understand it, of conflict between these two in two areas. One is that Sendero has aggravated the drug traffickers by imposing higher payment for coca farmers.

Another is that they have also imposed taxes on trafficking, which cuts into the profits of drug traffickers. And it seems that General Arsenaga [sic], who is the most well-known of the advocates of putting counterinsurgency before anti-narcotics effort, pointed out that anti-narcotics efforts really feed into Sendero's base of support by growing

coca farms over there. So would you talk about this and what implications this aspect of conflict has for U.S. anti-narcotics policy, and particularly the legal issues involved?

DR. TARAZONA-SEVILLANO: All right. Yes, that is true. The acknowledgment by the Peruvian government of the issue has been a separate matter. And I think this is very counterproductive. For one side, we have the military that was placed in the area just for controlling terrorism. And that was the stand of General Arsiniega. He was one of the last military chiefs in the area that tried to address the issue of narcotics and terrorism as completely separate entities. And in a way he wanted to win the support of the farmers for the military, and not do a thing with narcotics trafficking. That, the narcotics trafficking, since it was the problem of law enforcement, had to be dealt with by the police. So what General Arsenaga did is tried to gain this base of support, and he was widely criticized for that.

Right after his commitment to fight this insurgency, but only the insurgency as a separate manner, you know, he had tremendous problems. The U.S. was one of the major critics of General Arsiniega, and he was even said to be involved in drug trafficking himself, because there was no tangible help from his part to the U.S. efforts in the Upper Huallaga. When I refer to the interservice rivalries between the military and the law enforcement or police, actually there are areas of the Upper Huallaga that are just in the control of the military. The police cannot enter those areas. And it's said that the military also protects the activity of the local traffickers.

Now, when the police want to enter to a particular region that is controlled by the military, there are confrontations. So no single area is placed into the hands of the two forces at the same time; you know if one has priority over the other in one given area. So that is why I said there are two separate entities—that even though they work in conjunction against the state, the state doesn't work together against them.

MR. FRIEDMAN: Next question.

MR. PRADO: I am Antonio Prado, Chief of the Legal Department of the Embassy of Mexico, Sir. I'd like to make a brief comment on what Bruce said about the probability, if the Ninth Circuit will not return Alvarez Machain to Mexico, that Mexico would resort to kidnapping of American officials, the way it happened in the *Jaffe* case when Canada attempted to do something like that. No, we will not. We believe that we should not resort to illegal acts to further the rule of law. We prefer to take whatever redress to our national sovereignty, but we will not resort to illegal acts. This doesn't mean that we will not

make our best efforts to enforce the rule of law.

If you have seen the papers lately, the Mexican Air Force has been shooting down the Colombian planes that get into Mexican airspace without asking for permission. We have been very clear toward our South American friends that we do not want private planes in Mexico that do not have a flight plan, and if they fly into Mexico regardless of what their motives might be, and then won't abide by the signals of the Air Force, they will be shot down. And two months ago, we shot down two.

Now, referring to the comment that Mexico will never surrender a Mexican national, the treaty says that our President is empowered to surrender Mexican nationals. But in the case of *Alvarez Machain*, the crime took place in Mexico. Mexico was the jurisdiction where Alvarez Machain committed his crimes. Camarena was no diplomatic officer. He had no diplomatic immunity. Why should we surrender one of our criminals to a foreign jurisdiction? But the U.S. has lately resorted to the same idea. We have requested the surrender of Michael Joseph Carter from the U.S., an American who committed a crime in Mexico as a result of drug trafficking, and the U.S. said "no, because according to our discretionary power, we do not surrender Americans, but we prosecute them here." And this is the case.

The U.S. prosecuted Carter here, and we in Mexico are very satisfied because at least now we are operating in relatively the same way. We don't get it. You don't get it. But we prosecute. You prosecute. Now we have requested of the Department of State that they give Alvarez Machain back, not to party with *senoritas*--

(Laughter.)

MR. PRADO:—because under Mexican drug trafficking laws, there is no bail for traffickers, no bail for accessories before or after the fact, no parole, and absolutely no chance of civil rehabilitation after they get out. So that's what we want Machain for. And regarding the *Ker-Frisbee* case, I'd just like to say that I'm also a member of this bar, and I know a little of my American law, too. I went to Columbia Law School. So the *Ker-Frisbee* doctrine says that whoever came to the court wrongly seized but has been indicted or arraigned will remain in the court. But *Ker* is an 1890 case. *Kerr* versus—the man was abducted, he was not a Peruvian citizen. He was an American citizen living in Peru who claimed that he had the right to remain in Peru because he had received a permanent residence from the Peruvian government.

The case, the one in which the *Frisbee* doctrine is spelled out, is a

domestic case. It has absolutely nothing to do with an international situation. In none of those instances have the governments requested that the culprit be surrendered to them. But there is no fear that we will start kidnapping Americans. We resort to the rule of law, and after all of this, I'm saying that we don't want Alvarez Machain for too much. We are not requesting *amicus curiae* because we will need leave of the court, and we support that a sovereign should not be asking any other court to say what it wants. In contra-distinction, in my country any officer of the American government is allowed to go to the Mexican courts to file *amicus curiae* with the permission of no one. I just hope this has clarified some of the issues.

(Applause.)

MR. FRIEDMAN: Your presence here is very important to us, and your observations clarifying the issues are also very important. We have a response.

DR. PERL: I just wanted to say, not necessarily speaking for myself, but many Americans feel very strongly that this whole issue could have been avoided in the first place. One of the things that countries do is avoid incidents between countries, and had the Mexican authorities arrested this man in Mexico and investigated the case a little bit stronger to begin with, it might have been avoided.

MR. FRIEDMAN: We have time for one more question. If not, we will adjourn, and let me give you the logistics, I think we are booked 101 percent for lunch, and I hope that all of you have your luncheon tickets available. You can have about four or five minutes. I think the luncheon tables are set and please take your seats. There are no reserved tables. Thank you.

(Whereupon, at 12:35 p.m., the meeting recessed, to reconvene at 1:35 p.m. for the luncheon session.)

II. STRENGTHENING THE REGIME OF EXTRADITION

MR. LEIGH: Ladies and gentlemen, could I ask you to take your seats so that we may begin the [next] panel of the day? I realize that even if we start in the next few minutes, we will have only approximately an hour for this subject. We have an agreement among the panelists that we would like to leave as much time as possible for questions and answers and so the speakers have agreed that we would probably be best advised to keep each participant's remarks to about ten, not more than fifteen minutes, and hope that we can save enough time for a lively question and answer period.

My name is Monroe Leigh. I've been asked to chair the panel on Strengthening the Regime of Extradition. We have four speakers, and I think you'll find that each of them has something very special to bring to this subject matter. Our first speaker is Mark Richard, Deputy Assistant Attorney General in the Criminal Division. Mark is an old colleague and friend of mine. We were involved in working out the details for the first prisoner exchange agreement, the one between the United States and Mexico.

He has had nearly every position of importance in the Justice Department in connection with the Criminal Division, and it's a particular pleasure to welcome him to this program. I think you will find that he has a perspective and an experience in this field which is quite unique. I give the microphone to Mark.

[This is a report on Mr. Richard's comments:

Mark Richard is responsible for processing the over 1400 U.S. extradition requests abroad, and the 450 foreign requests pending in U.S. courts. He described various barriers to this expanding area of international interdependence. Many treaties are obsolete, and fail to embrace our most effective narcotics enforcement laws, such as RICO. The European Court may be an obstacle in the future, taking jurisdiction even after European countries have authorized extradition to the U.S. In South America, if extradition is not allowed because of a "nationality principle," fugitives may never be brought to justice, because those countries cannot effectively apprehend and prosecute. That is less of a problem with our European allies. The "political offense exception" has been a significant impediment to extradition in certain cases, related to the scope of habeas review. Finally, he expressed uncertainty about how to handle cases in which the fugitive has already received a grant of political asylum prior to the extradition request. All these factors are impediments to mounting an efficient and effective program.]

(Applause.)

MR. LEIGH: Thank you very much, Mark, for that insightful presentation indicating what the future difficulties are going to be. We are very grateful for your presentation. Our next speaker, ladies and gentlemen, is John Murphy. John is a professor of law at Villanova University Law School. He received his law degree from Cornell University. He has also served with great distinction on the faculty of the law school at the University of Kansas. I should also mention that he has held the Charles Stockton chair of International Law at the Naval War College in Newport.

Among his publications, there are many which are relevant to to-

day's discussion. He is the author of *State Support of International Terrorism: Legal, Political and Economic Dimensions*, published in 1989. Another work, *Punishing International Terrorists: The Legal Framework for Policy Initiatives*, published in 1985; *United Nations and the Control of International Violence in 1982*; *Legal Aspects of International Terrorism: Summary Report of an International Conference*, in 1980. I could give others. At the present time, Professor Murphy is chairman of the ABA Committee on International Institutions Law and the ABA's Alternate Observer at the United States Mission to the United Nations. He is also a member of the U.S.-Soviet Task Force to Prevent Terrorism, and serves on the board of editors of *Terrorism: An International Journal*. It gives me great pleasure to offer the microphone to Professor Murphy.

DR. MURPHY: Thank you very much, Monroe. Just one small correction on your very generous introduction. I'm the past chairman of the Committee on International Institutions Law of the American Bar Association. We've just had a changing of the guard.

In the brief time that is given to us this afternoon, I'd like to set the question of Strengthening the Regime of Extradition Against Drugs and Narco-Terrorism in a slightly broader context than Mr. Richard has. I'd like to set it in the context of the general question of how we ensure that those who have been accused of engaging in terrorism or narco-terrorism or trafficking of drugs are brought before a forum where the due process rights of the accused will be protected.

That, indeed, is the primary goal of extradition. It's a method for ensuring that the individual who has been accused of the crime is brought to justice. I think it's important to note also that extradition is only one of the methods of bringing an individual before a forum that may exercise criminal jurisdiction over him.

And indeed, it is not the primary method. In addition to extradition, and in part because of the barriers to extradition as a methodology, two other methods are often employed, one being deportation where the individual is simply sent back to a country which would like to exercise jurisdiction over him, and the other is kidnapping or the seizure of the individual abroad. I think it's worth just a moment to distinguish among these three different methods.

There are a couple of major distinctions. Extradition, of course, is the only method that is truly bilateral or for that matter in some instances multilateral. It is also the methodology that in most instances, although not all, provides the greatest protection for the rights of an accused necessarily involves the greatest amount of international

cooperation.

By contrast, deportation is basically a unilateral method of ensuring the return of an individual to a country that may be seeking him, and of course, by definition, the seizure of an accused abroad is unilateral, at least in the situation where there is no cooperation on the part of the country where the individual is sought. Extradition has not been utilized as much as the other methods because it does not serve as an efficient method of ensuring the individual is going to be brought to prosecution.

However, I would suggest that there is another goal to be served here besides that of efficiency, and that is ensuring the due process rights of the accused. And in most instances, as I mentioned, extradition is a method that is designed to ensure that the accused gets a fair day in court.

Now let me turn to some of the problems of extradition. These have been identified to some extent by Mr. Richard, but I'd like to add one or two and maybe put a different spin on a couple that Mr. Richard mentioned. One barrier to extradition that was not mentioned is that in the case of the United States there is a need for a bilateral extradition treaty for the United States to send back an individual to a country that is requesting his presence.

It is, at least in theory, possible, and perhaps even as a matter of law possible, that the United States could use some of these multilateral conventions in the antiterrorist area, hostage taking, attacks on diplomats, and most recently the U.N. Drug Convention as an extradition treaty. However, U.S. law has been interpreted as not permitting this. One of the problems with U.S. extradition law is that it's sadly out of date. There was an attempt to amend extradition law that would have allowed the use of these multilateral treaties as a basis for extradition. Unfortunately, the law was not amended, not because of that issue, but rather because of another problem we'll talk about in a second, the political offense exception.

Another barrier to extradition is that there are a variety of defenses, some of them quite technical, under the average extradition treaty. Some are non-spectacular defenses. They don't get much attention: the need to establish probable cause; the need for double criminality; the need for specialty, *i.e.*, that the individual be tried for the crime for which the country is requesting his presence. The nationality barrier that Mr. Richard has mentioned is another one, especially with Latin American countries.

The political offense exception, I would suggest, while a major

barrier in the terrorism area, is normally not going to be a barrier to extradition in drug trafficking cases because, absent some extraordinary circumstances, drug trafficking is a private act by private individuals. Moreover, it is worth noting that the recent U.N. Convention expressly, unlike other multilateral conventions, say in the terrorism area, rules out the political offense exception as a defense.

So as the U.N. Convention gains more and more parties, the political offense exception presumably will become less of a problem. Another barrier that is particularly relevant narco-terrorism is the situation that we see in Colombia and some other countries. That is, the use of terrorist attack tactics against the law enforcement officers, the courts and so forth, in an effort to prevent extradition. Colombia has been the most spectacular example.

Now let me, in the brief time left, turn to some possible resolutions of these problems. One resolution is to amend the United States extradition law. It would be helpful from the point of view of efficiency to amend the extradition law, especially with regard to this question of what constitutes an extradition treaty. Moreover, the law badly needs to be streamlined.

Second, with respect to the problem that a requested country may not extradite its nationals, it seems to me there are two possible resolutions. One is a change in the legal position of the potential requested country, and this has happened to some extent. Another is the approach taken in the U.S.-Netherlands extradition treaty, which provides that a national may be extradited on the understanding that the requesting country, if the individual is convicted, will send that individual back to the requested country in order to serve the prison term.

With respect to the political offense exception, there are a couple of approaches. One, of course, is to eliminate drug trafficking as a possible political offense, as was done in the U.N. Convention, which was done with respect to terrorism in a regional convention, the European Convention on Suppression of Terrorism, and more generally has been done in U.S. bilateral treaties which eliminate as a political offense any crime covered by multilateral criminal law conventions.

A second way to do it that is much more controversial is illustrated by the sharp debate over the U.S.-U.K. supplementary extradition treaty, where the political offense exception was simply eliminated, not with respect to the specific so-called terrorist crimes, but more generally as to crimes of violence. The final outcome on the debate was the insertion of a provision in that agreement which, in effect, changes the rule of non-inquiry. The rule of non-inquiry is that a court will not look

into the issue of whether a country is seeking a person for purposes of persecution based on political opinion or race or nationality or religion. This is a decision normally to be made by the executive branch.

The U.S.-U.K. Supplementary Extradition Treaty gives that function to a court. It was the price to be paid for substantial elimination of the political offense exception. Moreover, the *Ahmad* case was mentioned in connection with the political offense exception. It's worth noting that Judge Weinstein in the *Ahmad* case, while deciding that an attack on an Israeli bus with civilians was not a political offense, also decided not to apply the rule of non-inquiry and looked into two issues: was Israel seeking to get this individual because of his nationality or political opinion; and could he get a fair trial? Judge Weinstein found that the answer to those questions was no, it was not seeking him for purposes of persecution; and yes, he could get a fair trial.

There was an appeal by the accused. The Second Circuit upheld the lower court's decision, and by way of dictum questioned Judge Weinstein's waiver of the rule of non-inquiry. Judge Weinstein's decision and the appeal court opinion are well worth reading. Finally, I want briefly to address the issue of an international criminal court. I am not as negative on that prospect as Mr. Mueller is.

I'll just make a couple of quick points. First, those who are supporting the idea of an international criminal court, at least at this juncture, are talking about a very limited jurisdiction, just relating to drug trafficking, not relating to terrorism. Terrorism is a different game. Terrorism is too political and too controversial. Second, as far as the U.S. perspective is concerned, the court would in all probability be simply an alternative forum. So if a country in the Caribbean decided that it couldn't try an accused because of political or legal difficulties, and it could not extradite him to a country such as the United States, it would have available an alternative forum, namely, an international criminal court. The issue is complex. I myself have been highly skeptical of an international criminal court in the past. But I think that this idea is one that deserves more thought, and I would hope not an *a priori* rejection, until we've examined all the possibilities. Thank you very much.

(Applause.)

MR. LEIGH: Thank you very much, John. We are moving along now. We have had one governmental point of view. We've had now an academic point of view. We next turn to a practitioner point of view. Our next speaker is Joe diGenova, who has had a varied experience and only recently has begun to concentrate in the private practice field. He

is a graduate of the University of Cincinnati and of the Georgetown Law School. He's held numerous important posts with the Congress of the United States, and more recently he was for four years, a very important four years, the U.S. District Attorney for the District of Columbia. Joe is a very much sought after person by the talk shows. You can hardly name one that he has not appeared upon.

Joe, as I give you the microphone, I assure you that although we cannot guarantee you the same audience that you would get on the MacNeil-Lehrer Program, you nevertheless are very welcome.

MR. diGENOVA: Monroe, thank you very much. I'm delighted to be here today, and particularly with this distinguished panel, and I wish to begin by expressing my respect and admiration for Luz Nagle, who is here from Medellin, Colombia as a judicial officer with grave responsibilities and who represents in the finest tradition the strength of the rule of law in the area which we are seeking to address here today. It's a privilege to share a podium with someone like her.

I will be very brief because I think the question and answer period promises to be much more interesting than anything I might say. Strengthening the Regime of Extradition. I don't think there is anything more important that could be done in this area than the following, and it is something which has been repeated by many people, and it bears repeating again, and that is that extradition will only work if countries never modify their behavior with regard to extradition based on violence or the threats of violence.

There is nothing more fundamental to the regime of extradition than never, and I underscore never, giving in to the threats of any organization, be they narco-terrorists or political terrorists, either within your country against your citizens or threats against your citizens in other countries, if people are going to be extradited by your country. We have many examples of countries who have provided safe haven in the false belief that by negotiating faustian bargains with either political terrorists or narco-terrorists, they would secure for themselves some form of political, legal, criminal and terrorist immunity.

It simply does not work, and the reason it doesn't work is when you negotiate with terrorists or narco-terrorists or political terrorists, they don't have to obey any rules ever at any time. And any deal you cut with them is by definition a non-deal because it takes two parties of equal strength to negotiate a bargain, any time you negotiate a deal with a terrorist, narco, or otherwise, there is, in fact, no deal.

We know from our own experience in this country that such negotiations not only serve no useful purpose, but they tend to discredit poli-

cies which are important in encouraging the rest of the civilized world to modify their behavior and to emulate ours. Our own recent experience in the Iran-Contra affair, I think, obviously underscores vividly the danger of breaching the rule that you do not do the things that we have long said you do not do.

Another point I would like to underscore is that strengthening the law of extradition by virtue of better case law, which is beginning to come our way with regard to interpretations of the political offense exception and other rules such as going behind or looking behind the reasons and the likely outcome of proceedings in the requesting country, are extreme developments. And it is important in those instances where treaties are excluding the political offense exception to try and have that repeated as much as possible. We must continue, the United States must, and indeed has, thanks to the leadership of people like Mark Richard and others in the State Department, to renegotiate treaties, to modify treaties, to modernize treaties to include the offenses, some of the offenses which have been alluded to.

I think, however, we must be realistic and understand that many, many countries simply will not accept the expanded view of the criminal law which the United States has written into its statute books over the last few years, and indeed, in order to be successful they need not do so. It is quite fine with me if countries choose to use rudimentary crimes as the basis upon which to extradite either their nationals or somebody else's nationals to our country. Whether or not they choose to enact copycat continuing criminal enterprise statutes, or the unmanageable, unannulable, unreviewable RICO statute, is a matter which I would prefer to have left out of an already quagmired area of the law, and I don't believe that we are going to be very successful in convincing civilized countries that RICO is something that they should adopt.

Indeed, many of them look at it and wonder in amazement how we ever could have structured something that is so complex that at least four members of the Supreme Court have already said they don't understand it. We may not have RICO to worry about after the next session anyway because there appears to be enough votes to question its validity in some areas, at least. But that's not really the point. The point is that we can modernize our treaty relations with a number of countries, and this is vital, to add narcotics offenses and other types of violent crimes, and other types of crimes involving financial matters such as money laundering. I would prefer to spend much more time worrying about money laundering additions to treaties than the more complex issues of RICO and CCE.

Those, I think, certainly would prove to be extremely helpful in extradition matters. I will not say anything about the area of non-extradition seizures because that's the next panel. But I just want to allude to it in the sense that it is important that we do, in fact, proceed to strengthen the regime of extradition by all of the things which have been mentioned by the panelists today because by doing so, we obviate the necessity for countries who do abide by the rule of law to have to resort to tactics which might not be acceptable to a lot of people under very difficult circumstances, particularly when a country cannot provide civil rule within its own borders and do all the things that we expect from a neighbor in a civilized world.

That will be dealt with next, however. I do want to underscore, however, once again that I don't think there is anything more important, and I know it's repetitive, but I'm going to say it again, that there is nothing more important in this exercise than a country never modifying its behavior based on violence or threats of violence. From my own experience in the area of extradition, which includes not only narco-terrorism cases as a proponent for the United States, but financial crimes in Western Europe, terrorism crimes in Western Europe and narcotics offenses in Colombia, in my office in 1983, we brought back the first Colombian ever to be extradited under the new treaties which had been ably negotiated by the two governments.

It was not an easy task, and it took a great deal of courage on the part of the Colombians, and I applaud them again for the risk that they have taken because of the rapacious appetite of the American public for illegal drugs. And while I have repeatedly criticized the Colombian government for having taken too long to realize that its own Faustian bargain with the major traffickers had led to the problems that we were facing and they were facing, there is just no question that the major responsibility for this problem lies with the people of the United States who have created this problem as a result of their incredible demand for illegal drugs.

And may I express my apology today to the representative of the people of Colombia who is here for the conduct of our current mayor of the nation's capital who singlehandedly has done more to damage the relationships between our two countries, as a result of his conduct if not his trial, than perhaps any single person in the United States. We in America owe the people of Colombia a sincere and deep apology for the level of our self-indulgence, and an apology on a grand scale for the conduct of an elected official of this city.

Once again, we should never ever modify our conduct with regard

to extradition based on the threats or actual carrying out of violence of terrorists and we must do more to modify current law with regard to extradition and make it streamlined, modern and accessible so that we can stop the misuse of the extradition process as I believe it has been misused in many, many cases, all of which are well-known to you, so that extradition remains a viable tool to prevent countries from seeking the options that none of us like.

(Applause.)

MR. LEIGH: Thank you very much, Joe, for those very trenchant observations. Our next speaker brings a perspective which we are probably more in need of receiving than any other person could bring. She comes from Colombia. Luz Estella Nagle has come to us, however, most recently from the University of California Law School where she is a student and a candidate for an LL.M. degree. But before that, she had a very distinguished career in her native Colombia.

She is a doctor of law in political science from the Universidad Bolivariana in Medellin, Colombia. In addition, she has served on the faculty of law at that institution. She also has been a district judge in the ministry of justice of the Republic of Colombia. She presided over the investigation and expedition of civil and criminal cases. She arbitrated and mediated labor conflicts in the capacity of an amiable compositor. She also supervised law enforcement throughout the jurisdiction. She served on the bench of Colombia from 1983 to 1986. She has been a lecturer also on sports law at her University in Colombia. It gives me the greatest pleasure to welcome Ms. Nagle to our panel.

(Applause.)

DR. NAGLE: Thanks. First of all, I'm going to tell you briefly about where I lived when I became a judge. This was a small village close to Medellin, a town called Sevanata [sic], close to where the drug lords have the big farms. Even as judge, I had to buy my pencils, my pads, and sometimes I had to take the bus or ask my mother to give me her car because I didn't have enough money to get to work. But the worst part was in 1985, when we had the big crisis and the Palace of Justice, as you all know, got blown up and so many people died. We received a communique from the government that they couldn't bring any forces to any judges or protection to anyone, and by that time the guerrilla groups had said that they were going to attack Sevanata where I was working.

The strike was a national strike. There were no buses, no one went to work, yet we had to work. Otherwise, we were going to be punished. I had to go out and try to see who could take me to work. I had to

change cars three times, but I got to work. They told us to wear tennis shoes to work because if you have to run, you run. And that is no joke. I wore my tennis shoes, and that was one of the days in which the government couldn't provide the judges with any protection at all.

Once on a Sunday, in this small village, a seven year-old child came to me and his shirt was all bloody. His father had been stabbed with a knife, with a machete, by another person. I called the police, the police station was twelve kilometers away from where my office was, but the officers said they were taking their lunch. They said they had no car, and could not respond. I was shocked, and begged them—knowing time was short and this attacker could escape. They said they had no transportation, so I had to take my car and go down and pick up the police officers, so that they were able to go and chase this person before he escaped.

All this, just to tell you that in Colombia, the judiciary system is the Cinderella of the three branches. It's the Cinderella because the judiciary system hasn't had the respect that it should have. I mean all of you know that being a judge should be something that will bring respect because they are imparting justice. But no, in Colombia, the judiciary system is the one that is begging left and right. Judges don't even have enough money to take buses sometimes. How can we expect judges to sit comfortably on the bench and be able to provide justice when they receive so little respect from the other two branches?

That is very difficult. But judges do apply the law in Colombia. Of course, some of them were and are corrupt, but others aren't. Others are trying to really do their duty, and the Colombian system is one which is positivist. In Colombia, what's important is the statute. If there isn't a statute that is going to tell the judge that certain conduct has to be criminalized, that judge cannot say this person has committed a crime. So the judge has to follow the law, and some judges do try to apply the law. But during this period of time in which I was on the bench, so many changes occurred, the government was trying to find more statutes to help solve the problem, to try and resolve this criminality that was really eating alive the judiciary system in the whole Colombian society.

But that wasn't the answer. We had many rules in the criminal code and many cases were taken away from the judges, yet they created new judges, provisional ones to deal with the drugs, because they thought that the existing judges were not doing their job. But they didn't realize that sometimes it was very difficult because even the executive power, the politicians, were getting involved in criminal sen-

tencing. Politicians had their hands in the solutions that the judges were trying to implement, because some politicians, too, were and are corrupt. They had their own interests.

So, again, we have judges in the middle. They are like a sandwich. They are caught in the middle of the crisis. And the problem is not one that is going to be resolved by imposing higher punishment, or by reducing the penalty for narco-traffickers, because not even these people are secure. They know that as soon as they are seen talking to the judge, they might be killed also.

I think that the problem is that we have too many statutes, and that those statutes that we have already are not applied. If someone that's going to commit a crime knows for certain that the rule is going to be imposed on his behavior, and he's going to be punished because of that, maybe he will think twice. But if we are going to start changing the rules and changing the treaties and changing the statutes, we are going to be creating more of a crisis. And then judges and people who will have to make decisions are going to get lost.

Some comments were made this morning that drugs run Colombia. Drugs don't run Colombia. And the proof is that Colombia had elections last year. We couldn't say that the elections were bought. No, people in Colombia do believe that there is democracy, and they want to believe that they do have a democracy. They elected a new president, and they are putting all their faith and hopes in this new president. They are doing business, they are contracting, they are still going before the judges, asking the judges to give them justice.

So I think that although there are so many problems, Colombia does believe in democracy, and the problem in a sense is the infrastructure. If the United States is going to help Colombia, it should be willing to give advice in that infrastructure. As soon as the Colombian government rebuilds the judiciary branch, Colombians will be able to take the judgment of those that we're calling extraditables into their own hands.

President Gaviria talked about the extradition. I don't think that what he expressed was that Colombia wasn't willing to cooperate with the extradition. He was talking about narco-traffickers and narco-terrorists. He was talking about two different figures that within the Colombian system we call peoples, which means they are two different conducts. And if an individual behaves in a way that his conduct has every single element of one or another, the sanction for that one will be imposed on him as a punishment. And he said that one of them will be the extreme sanction, which will be extradition.

That prospect scares the extraditables. By President Gaviria saying that, he meant not that he was going to talk with the extraditables. No, a judge is going to judge their conduct and simply apply one or another sanction for that conduct. And he meant, for certain conduct, even extradition.

(Applause.)

MR. LEIGH: Thank you very much, Dr. Nagle. We have, I think, heard a most extraordinary presentation, and we have to be grateful to you for coming here to share your experience and to share the record of your extraordinary courage in your country. The floor is now open for questions. I will ask those who wish to speak to find the microphone, which unfortunately has been turned in the wrong direction. Take it a little father back down the aisle. In any case, are there questions for any member of the panel?

I think all of us are somewhat numbed by the realization of the experience that you have lived through, Dr. Nagle. My question really goes to John Murphy where he was talking about the question of using multilateral treaties for the purposes of extradition. I remember a good many years ago when I was in the Pentagon, and my job was to supervise the administration of the status of forces agreement on a worldwide basis, and annually my colleagues would have to go up to the Senate of the United States and make a presentation on how we were doing. And that brought us before a most extraordinary man, Senator Sam Ervin, himself a great lawyer. And very sympathetic to our program. But one of the issues that we discussed with him, John, from time to time was the question of the provisions of the NATO status of forces agreement, which require the sending state to cooperate with the host state in the punishment of crimes, especially where there was parallel jurisdiction. We had cases where servicemen were actually brought back to the United States, discharged from the service with honorable discharges, and nevertheless thereafter it was discovered that they had committed a crime abroad.

So the question is should we use the treaty as a basis for picking up a former soldier now a civilian United States citizen and returning him to Germany in order to stand trial for a criminal offense. During the time that I had responsibility for this program, we never had to face that question. But we discussed it from time to time with Senator Ervin. I would wonder what your reaction would be to that?

DR. MURPHY: Well, the question of using the multilateral treaties as a basis for extradition requests arises in the case of the anti-terrorist treaties and the Drug Convention, because it is specifically

provided in those conventions that, if there is no bilateral extradition treaty between the two parties concerned, they can use the multilateral convention. In that context, it seems to me that there is something to be said for at least considering these multilateral conventions as a possible basis for extradition, because there is an extradite or prosecute protection that is built into most of those. If, for example, the United States were to try to get an extradition from a country with which it does not have a bilateral extradition treaty, that country could refuse the request, but it would be obligated to submit the individual to prosecution under its own system of criminal justice. There is a requirement that submission to prosecution be done in good faith, and that would require a prosecution free of the political dimension.

It also would require—in fact, this is often written in—the imposition of severe sentences if it appeared that the accused indeed had committed the crime. The problem may be most acute going the other way. That is, where the other country uses the multilateral convention as the basis for a request to the United States that it send an accused to that country for trial. The fear has been that the accused will not get protection in terms of due process.

In that kind of situation, however, under the multilateral treaties, the United States itself would be under an obligation to bring the individual to justice if it declined to extradite. Indeed, it's an obligation under the convention that the United States enact legislation which would give extraterritorial jurisdiction over the crime in the situation where it declines to extradite. So if the United States is worried about the protection of due process rights, it would be able, indeed it would be obligated, to submit the individual to prosecution in the United States.

My problem with the United States requiring in all instances that there be a bilateral extradition treaty is that there may be instances where we want to trigger the mechanisms of the multilateral conventions and ensure that the individual is submitted to prosecution somewhere, in the United States or abroad. But under a regime that will not allow extradition from the United States in the absence of a bilateral extradition treaty, and requires a bilateral extradition agreement for the United States to make an extradition request, you may never get the extradite or prosecute mechanism into operation. And so, as I said, in the draft legislation that was before Congress at the time there was this huge battle over the wording of exceptions to the political offense exception, the law would have been changed to permit the use of these multilateral conventions as a basis for an extradition request.

MR. LEIGH: Thank you very much. I have another question I'd like to direct to Mark Richard, and that is the question about extraditions. I must confess I'm not too familiar with the recent history of the U.S. government position on amendments to the extradition treaty. We have categories that permit the extradition of U.S. nationals and categories which have been interpreted in the *Valentine* case as not permitting the extradition of nationals of the United States.

MR. RICHARD: Well, the *Valentine* case, which is fairly old, does not reflect a policy position of the U.S. government. We have consistently taken the position that as an issue of policy, we are prepared to extradite our nationals. What we have is a drafting defect, if you will, reflected and picked up by the Supreme Court in the *Valentine* case that suggested that given the underlying statute, and the almost discretionary terminology of some of our older treaties, there was insufficient treaty language to accomplish the extradition of the nationals. We have been consistently trying to, as part of the process of updating the extradition treaties, to take care of the *Valentine* situation which, as I said, is at least in my perspective essentially a drafting problem.

As a question of policy, we take the position that if we're prepared to enter into an extradition relationship with a country, it is a reflection of our confidence in the integrity of the system and the fairness of the processes employed by our treaty partner, and therefore, we would be prepared to see the U.S. nationals be subject to the extradition. We are confident that if there is any deviation from the capability of the receiving country to provide adequate due process protection, regardless of whether we're dealing with a U.S. national or otherwise, we're confident that the State Department would not issue the final warrant and allow the extradition to a country where it, the State Department, did not have confidence the individual would receive a fair trial.

If I may, Monroe, I wonder if I can just go back and elaborate or comment on some of the implications, as I see it, of utilizing a multilateral as a basis for extradition out of the United States? Aside from questions of treaty interpretation whether these multilaterals are for our purposes self-executing and could constitute an adequate treaty basis for extradition, we have a variety of very real practical concerns with that approach. One, it at least raises the specter of us entering into potential treaty relationships, extradition relationships with countries that we are not particularly ready to do so. If you look at some of the multilaterals you have some interesting countries that are signatories to those multilaterals.

I'm not sure that we want to, at this point in time, enter into bilat-

eral extradition relationships with Libya and other countries that are members of these multilaterals. Moreover, our concern with the extradite or prosecute language in a lot of these multilaterals is a very real one. By and large, to fulfill the requirement of prosecute, the country will turn around and ask us for our evidence. This is not always, as a practical matter, an easy task to provide the country with the evidence, depending on the source of the evidence, the willingness of witnesses to cooperate with the foreign government and what have you.

So the technical arrangements that are engendered by this triggering of the requirement do pose at times some real problems. That's reflected, for example, in the German decision on Hamadei to exercise their right to try him rather than extradite him. One final point that gives us concern, and that is the triggering device and its implications for subsequent efforts to extradite the individual from third countries. For example, you have a lot of countries who are signatories to these multilaterals who would like nothing better than to have the opportunity to prosecute pursuant to their obligation. Thereafter, the acquittal or lenient treatment of that offense, in effect, may very well give the offender an international bath and protect him or her from subsequent extradition from third countries who would see the individual as having already been prosecuted for the offense being sought for.

So we in the enforcement community have to be very careful whether we wish to expose ourselves to this consequence depending on which country is involved and the anticipated reaction of the country to a prosecution. We have had difficulties in this area. We have gotten burned in the past involving some very notorious offenders, and it is something that I would suggest warrants a very cautious attitude on our part.

MR. LEIGH: Thank you very much, Mark. I hope no one in the audience is being discouraged from making a comment by not having a microphone in front of him or near him.

DR. MURPHY: Could I comment on his comment?

MR. LEIGH: Yes.

DR. MURPHY: The case of Hamadei is an interesting one in the sense that this was not a situation where there wasn't a bilateral extradition treaty. We had both the anti-hijacking convention and a bilateral extradition treaty, and Germany refused to extradite Mr. Hamadei and instead submitted him to prosecution, and it had a perfect right to do so. That is, under the multilateral convention the requirement is extradite or prosecute, and so Germany fulfilled its obligations under the multilateral convention, and there is an exception to the U.S.-German

extradition treaty in a situation where the requested country determines it has jurisdiction to try the individual and exercises that jurisdiction.

It's worth noting that Mr. Hamadei was convicted and sentenced to a rather substantial sentence, despite all the hostages in Lebanon. Moreover, with respect to possible difficulties of using the multilateral conventions, my basic point is that it ought to be an option that's available. That is, the decision may be made that we shouldn't use a multilateral convention, and indeed there is a lot to be said for using bilateral extradition treaties instead. But as interpreted presently, U.S. extradition law does not provide the option.

It seems to me that having the option available might be desirable in certain circumstances. The decision whether to use it could be made on a case by case basis.

MR. diGENOVA: May I address the issue of the Hamadei case, please, because I think, Professor, while what you say has the ring of truth to it, there is a problem with what you have said, and it's very simple. The Germans had absolutely no equities whatsoever in the Hamadei case, none. That crime was not committed on German soil. No German citizens were involved. It was an American aircraft. An American sailor was murdered on the Tarmac in Beirut. American citizens were held hostage, and an American airline was involved. The only reason the Germans got Mr. Hamadei was an accident by which he was arrested upon entering their country.

The only reason the Germans did not extradite was because their citizens were taken hostage in Beirut at the time of Mr. Hamadei's arrest. Their conduct was absolutely and unequivocally modified with regard to extradition conduct because their citizens were taken hostage. You are absolutely correct that Mr. Hamadei was tried and convicted, and I know a lot about the case because I went to Germany and tried to convince the Germans to extradite Mr. Hamadei.

Indeed, there is a very wonderful story about the courage of a series of Americans who were asked to come to Germany in an unprecedented request by the Germans to appear in a line-up in an attempt to identify Mr. Hamadei, which was an outrageous request, totally illegal, not required by any extradition treaty. But the United States did it at the request of the German government because the Germans feared that if they extradited Mr. Hamadei to the United States and found out later that he was not the right person, even though that is not the law, that they might have lost two citizens in Beirut who might have been murdered if he were extradited.

We responded to that immediately and found three courageous Americans who were willing to drop what they were doing, risked their own lives by going to Germany with me and a number of other people, appeared in a line-up and absolutely identified Mr. Hamadei on six separate occasions with each one of them, unequivocally. Upon our return to the United States and landing in Dulles, we were told that notwithstanding the identification, the Germans decided not to extradite. And the reason was very simple: they modified their behavior because of threats against their citizens who had purposely been taken hostage in Beirut to prevent the extradition of Mr. Hamadei.

The Germans had no choice but to try Mr. Hamadei, and they did live up to their legal obligation under the treaty. It is true, but it is also true that they clearly and unequivocally modified their behavior, and while he has been given a lengthy sentence, it remains to be seen whether or not he serves it. There are many countries in Western Europe who have dealt for a long period of time in the undercurrents of the Middle East, and made what can only be called, and I'll repeat it again, faustian bargains, and it remains to be seen how much of his sentence Mr. Hamadei will serve.

I have great respect for the prosecution authorities in Germany who came to our country and my office and spent months working with Mr. Richard and myself and others to get all of the evidence, which was only in the United States to prosecute that case with only American witnesses and only American experts in a German court. It's very important to realize that the *Hamadei* case, while it ended with Mr. Hamadei being convicted properly in a German court, was a frustration of the extradition process because the Germans modified their behavior out of fear of the murder of their two citizens taken hostage. Their two citizens were released, I might add, and there have long been undercurrents of deals going on between the German government and factions in the Middle East with regard to the release of Mr. Hamadei.

But whether or not those undercurrents are accurate, I do not know. But it's important to understand what happened in the *Hamadei* case. And it was a fascinating display of the modification of behavior by a country on the basis of threats by terrorists.

MR. LEIGH: Thank you very much, Joe, for that intervention. We have a question from the floor and another back there later.

DR. TARAZONA-SEVILLANO: I just wanted to recall some of the remarks made by Luz. Actually they remind me of many experiences back home, and I was shocked by our speaker at lunch, who referred to the Peruvian case as a discrete case in the situation of

narco-terrorism. Actually I didn't want to embarrass him in public, but I think it essential to make the situation clear. Producing countries such as Peru have these tremendous problems with infrastructure, as Luz has mentioned. Our infrastructure is practically non-existent. Funding for the judiciary is minimum. In Peru with a massive economic crisis that can allocate the proper funds for law enforcement, the judges are paid terribly and prosecutors are also not well compensated.

Well, anyhow, we can say that this is the sickness of the country in general, but what I want to stress here is that what happens in the capital sometimes does not receive the same attention by the media. What happens, for example, in coca and cocaine growing regions that are far away something that is too far away from the capital so that people just do not care. At least it seems that neither the government nor the international community has the knowledge of what happens in this remote region.

Also, in rural Peru, in areas where the trafficking is high, such as where I've been a prosecutor, in a sparsely populated province which is at the border of Peru with Ecuador, you have to really be able to take the law in your hands to make it work. And you have this problem of not having an infrastructure to assist you, having to pay for the gasoline to go on raids, having to practically ask here and there, you know, to be able to complete some assignment. And this cannot be something that can continue forever if we want the rule of law in these producing countries to be something that will be strengthened. I think something also very important to consider is not just the military factor of it, but also that the institutions of the state should be strengthened.

And one of these institutions is the judiciary. I have a friend who was killed and blown up by dynamite with a special police force when he went on a raid for cocaine. Myself, I had to change routes everyday to go to work which was thirty kilometers away from the place that I was living. And these remote areas are practically no-man's land. You are exposed to a number of dangers so that you are fearing for your life every single minute. So what Luz has said that she had to buy some of her supplies and all of that, is something that seems to be a common denominator in other countries such as Peru, too.

Actually, you know, to enforce the law, I had the good fortune, compared to hers, of having protection. (You know I had protection.) I had a body guard with me 24 hours a day. I had police in my office and police in my home, but eventually that doesn't protect very much because the police sometimes are not very trustworthy. If you had to do something very important, you had to do it in high secrecy, tremendous

secrecy.

This secrecy had to be enforced practically by yourself. In my case, I was the only prosecutor and I was on duty 24 hours a day. And so the judiciary is there. The institutions are there. What is needed is for these institutions to be strengthened, and the only things that might ameliorate what is happening in these producing countries is for the judiciary to have enough support to really fulfill its mandate. It's true there are some members of the judiciary that have been bought by drug money, but they are not the majority. There are a number of people who are fighting this war on drugs that seem to have no—anywhere. Okay. Thank you very much.

(Applause.)

MR. LEIGH: Ladies and gentlemen, we are somewhat over time. We have time for only one more question, and I agreed to let Harry Almond give the last question. Then we must adjourn to allow the next panel to resume.

MR. ALMOND: Thank you, Monroe. This question is very brief. It's raised in connection with a slightly hypothetical set of facts in the Hamadei situation and addressed to John Murphy. Our treaties provide for prosecute or extradite. Suppose that in this hypothetical case the Germans go ahead and prosecute and then we bring up a claim for an entirely different crime based on the same facts. I'm trying to get away from double jeopardy. Do they then have an obligation under that particular clause to extradite?

DR. MURPHY: I assume that the hypothetical crime that you're talking about is something other than aircraft hijacking?

MR. ALMOND: That's right.

DR. MURPHY: The question would arise under the bilateral extradition agreement. And the question would be whether this really was another crime so there was no double jeopardy problem. As long as you asked a question about Hamadei, I want to respond to Mr. diGenova's comments, and I'll make it very brief.

First, you'll remember that when I talked about Mr. Hamadei, I was not giving a general comment on the *Hamadei* case, but rather pointing out that the *Hamadei* case involved both a bilateral extradition agreement and a multilateral extradition agreement. So the question of using just the multilateral agreement did not arise. I suspect that the German officials who made the decision to prosecute Mr. Hamadei would not agree with the evaluation that they were giving in to pressure although to be sure they can speak for themselves. Perhaps this particular case raises the issue of whether we can find a more dis-

interested forum, which brings us back to the international criminal court issue. Thank you.

MR. LEIGH: Ladies and gentlemen, I think—

MR. diGENOVA: Let me just respond because it's important to respond to it. The prosecution authorities didn't make that decision.

MR. LEIGH: The prosecutor gets the last word.

MR. diGENOVA: The political authorities in Germany made that decision. Secretary Shultz asked that Mr. Hamadei be extradited, and Helmut Kohl, for reasons which are legally justifiable in one sense, decided not to extradite in the interest of protecting his citizens who were then hostages. The problem with the hypothetical is that given the facts in Hamadei, if the United States were to come up with another crime which had separate facts, the Germans would do the same thing again. They would try to try him in Germany because presumably there would still be hostages. And, in fact, their conduct was modified, and we know that for a fact. They decided not to extradite because German nationals had been taken hostage as a result of Mr. Hamadei's arrest.

There just isn't any question about that. It's a matter of record, and while it is wonderful that the Germans spent all that time preparing that case with U.S. citizens as witnesses, U.S. physical evidence, FBI agents, American experts, the truth is they had no connection with that case whatsoever and no equities whatsoever except their citizens who were hostages. It is the quintessential example of the modification of a country's behavior because their citizens have been taken hostage and threatened by terrorists. And it has nothing to do with multilateral treaties.

MR. LEIGH: I think we have to adjourn in order to allow the next panel. So may I ask you all to thank our four panelists for their contribution.

(Applause.)

MR. LEIGH: Please come back in about five minutes for the next session.

(A short break was taken.)

III. SEIZURE OF NARCO-TERRORISTS ABROAD

MR. diGENOVA: Please be seated so that we can—some of our panelists, this is the middle of their business day, and they need to get back to their positions of employment, unlike the rest of us who are lounging around here learning today. We'd like to get started on the 3:30 panel which is entitled "The Seizure of Narco-Terrorists Abroad,"

an issue which has become current as a result of a number of recent cases, most particularly the case currently pending in California against Rafael Carroll Kentaro [sic] and a group of defendants in matters dealing with the seizure of a Mexican doctor and his rendition to the United States. The moderator for today's panel was to be Victoria Toensing. She is in trial in Boston, Massachusetts, and I am substituting for her today under orders from my wife, Victoria Toensing, to do that.

(Laughter.)

Mr. diGENOVA: I'm going to introduce each of our panelists right now, and then we'll just run through them in the order in which they are on the panel. Our first speaker will be William P. Barr, who is the Deputy Attorney General. Mr. Barr is a lawyer of great distinction in this city. He has been the Deputy Attorney General since May of 1990. Prior to that time, he served as the Assistant Attorney General for the Office of Legal Counsel, a very, very important job where legal advice is rendered to the Attorney General, a position in which he used to render some very significant legal advice in the subject matter of our panel discussion today and about which he will speak. Mr. Barr has served throughout the government in the Central Intelligence Agency, and as a law clerk to a very respected member of our D.C. Circuit, Malcolm Wilkey.

The next speaker will be someone who is known to all of you, Judge Abraham D. Sofaer. He is currently with the law firm of Hughes, Hubbard & Reed, and is formerly the State Department of Legal Advisor and was involved in many of the issues about which we will speak on this panel and which were spoken of both earlier today and in the previous panel. He has served as United States District Judge in the Southern District of New York and has been a professor of law at Columbia University. His resume is much longer than what I have just given you but in the interest of time we will stop at that point.

The final panelist will be Professor Andreas F. Lowenfeld, the Charles L. Denison Professor of Law at New York University School of Law. The professor specializes in public and private international law, international economic transactions, aviation law as well as international litigation and arbitration. He is an author of books on international legal process, conflicts, aviation and international economic law. He has also written widely on various aspects of international trade, investment, finance and dispute settlement, and perhaps most relevant, has recently written a series of articles on U.S. law enforcement abroad

in which he takes the position that constitutional restraints on governmental action apply or should apply abroad as well as within the United States, a position which has recently been repudiated by the United States Supreme Court. We will now begin our discussion.

(Laughter.)

[This is a report on Mr. Barr's comments:

The June 1989 OLC opinion addressed the legality, but not the policy implications, of United States law enforcement agents making arrests overseas without consent of the local government in contravention of customary international law. The Court held that domestic United States law grants such authority. In so doing, it overruled a 1980 opinion and its two arguments to the contrary: 1) that the United States was powerless to take action that impinged on the sovereignty of other nations; and 2) that statutes authorizing FBI action abroad were to be construed to comport with customary international law.

The current position is that the President or Congress can, when necessary, override customary international law, because what is "customary" is not a static concept, but rather an evolving concept. By making judgments which are sometimes out of bounds, the United States plays an important role in shaping those rules. Our Constitution demands that our political branches, and primarily Congress, not let foreign ministries impose rules on the people of the United States without their consent. If customary international law constrains our government from what it considers to be an appropriate response to a situation, it must be rejected.]

JUDGE SOFAER: It's a pleasure to be here and to talk about this very uncontroversial subject—

(Laughter.)

JUDGE SOFAER: —that one can always feel confident one is going to be quoted with impartiality and accuracy. Nonetheless, since we're used to being bashed with pieces out of our own words repeatedly after five years of Washington life, I'll plunge ahead. I completely concur with Bill Barr that the 1980 opinion should have been overruled. In fact, Joe and others in the Attorney General's office before this present administration came in had reached that conclusion, and Bill came along and did the work and implemented the policies that made a lot of sense, it seemed to me, in reversing the earlier opinion, which I think was extreme in the assertions it made.

On the other hand, I do think it's very important to say two things. One, to confirm that Bill's opinion did not address the international law and international relations aspects of such seizures abroad, non-consen-

sual seizures abroad. The President and the Attorney General and the Secretary of State made it crystal clear that there were important legal and policy concerns in connection with any such seizure that had to be addressed. There are always, in any of these situations where you don't have a seizure in international waters, at least three laws, or sets of laws involved. There is the U.S. law, there is international law, and then there is the domestic law of the country in which the action is taken. However authoritative the Office of Legal Counsel may be on the U.S. law, and the Legal Adviser combined with the Attorney General may be on international law, we are not authoritative with respect to the meaning of the local law of the other state.

We cannot pretend to dictate to other states about their local authorities and what steps they can take when a foreign state acts within their borders in a manner that they have not authorized. Bill has been emphatic in passing this on internally, as I have, that when an action of this kind is taken in a foreign country, the individuals involved, acting on behalf of the United States, might be considered kidnappers if someone dies as a result of this kind of action.

So it's a very, very serious business and obviously the United States keeps that in mind all the time in connection with these matters. Now the second basic point I want to make is not anything new. I want to emphasize this because people always jump on you, you know. You're saying something new. You're out of the government. I have always said that the issue of whether U.S. law has already authoritatively overridden customary international law, is undecided. The administration has a position. There is undoubtedly going to be at some point an interpretation of that issue, and I think it is incumbent on the administration to consider the rule that statutes are construed very narrowly when it is clear that to construe them otherwise would violate established principles of international law.

That is a doctrine that the administration, any administration, is going to have to come up against when it argues that a generally worded statute combined with the direction of the Attorney General overrides customary international law. It is crystal clear that if Congress has clearly authorized an action in violation of international law, and the President has joined in that and orders some action to be taken, however, clearly it violates international law, the courts, our courts, have repeatedly said that they will not intervene; that is a political decision.

But the question is, is it clear that Congress has intended a violation of customary international law in this area? So I think those two

conceptual issues are worth touching on, and then I'd like to talk about some practical things that give me some concern. First of all, I have defended the importance of international law repeatedly, both inside the government and outside the government in connection with these matters, not only because I believe in international law. Anyone who doesn't believe in international law is just closing his eyes to reality. And in that connection I might say that every now and then I hear how there is no such thing as customary international law, and a head of state who happens to be visiting the country or is planning a visit to the country can be arrested by the local U.S. Attorney, and I'm forced to write a little memo over to the White House pointing out that some idiot in the Department of Justice is claiming that he can arrest the head of a friendly state because there is no such thing as customary international law, and that person, that idiot, and I certainly feel he is an idiot, hears from the White House about the fact that, well, we don't care if there is no such thing as customary international law, you will keep your hands off the head of state of this friendly country without our particular approval.

Now, whether there is or isn't such a thing as customary international law, I feel that message that goes from the White House to the Attorney General's office is an important reflection of reality, and if you want to call that reality customary international law, as I do, then there is such a thing as customary international law. And it might well be based not on something that happened early in our nation's foggy childhood. I didn't think that John Marshall was particularly a foggy thinker, but rather because our head of state wishes to go to other friendly states and doesn't particularly want to be arrested by some idiot in the Department of Justice over there.

So there are very real concerns that I think may be appropriate for a certain degree of security that is helpful in the day to day operation of government. But I want to go on from there and say, yes, I stand up for international law and stood up for international law in the government, but I am appalled when I read publicly over and over again arguments about why it is so terrible and so outrageous that any foreigner ever gets grabbed overseas, brought to the United States, and prosecuted for some heinous crime.

I would just like to say that I don't think it's so terrible. First of all, it's been going on a long time, and we're not the only ones who do it. Foreign countries have done it repeatedly in human history. Now I would submit to you, having read every reported case of seizures abroad and having heard about many non-reported cases that I could

get my hands on, and I have some wonderful people working for me in the Legal Adviser's Office, that almost always these seizures occur with the consent of the state involved.

Now that consent doesn't have to be official. I'm not saying it occurs with a signed, sealed and delivered body and an order and everything else. It happens. Consent comes in all kinds of forms. And I don't understand why people are so keen on ratcheting up the rules relating to consent. Why do we have to have formalized consent of a foreign government? What interest are we serving by demanding a rigid and high degree of consent? It seems to me our law enforcement authorities know what they're doing in this area. They work with other law enforcement authorities, particularly with respect to narco-issues today, where narcotics violations are international crimes that almost every nation has agreed to enforce. I don't understand what interest we're serving by ratcheting up the requirements relating to consent.

If a colorable case of consent and good faith is present, why does a court have to even examine the issue? It seems to me that if the Attorney General's office in some kind of an affidavit makes it clear that a colorable basis for consensual action existed in the cooperation of the two law enforcement agencies involved, or even with some higher level official, that ought to be the end of that as far as any law is concerned—domestic, international or even the law of that foreign state. Now, with respect to those situations where the foreign country really is offended, and, in fact, no one in authority consented, I am also puzzled there as to why the issue is made an issue for our criminal law.

Why is it in our interest, in any nation's interest or in the public interest, to convert what is a very, very sensitive and extremely important issue of international relations into an issue of criminal defense procedure? It is a massive, it seems to me, expansion of the exclusionary rule at a time when we have learned after years of practice of all the lying, of all the corruption, and of all the injustice and cost and delay that the exclusionary rule generates, why apply such a failure of a rule in this area where the remedies, my God, can hardly be said to be inadequate.

I'm looking at my friend from Canada who happens to be here in the audience, and I'm sure there are many other foreign lawyers around who represent their countries so ably here, when we took an action (I take the rap in the sense that I was the Legal Adviser here) when some American goon takes the action of grabbing a foreigner in a foreign country and bringing him here, the roof caves in if there was no consent, in fact. The roof caves in, and we're not going to get into a

war with Canada, for God's sake. The issue here is friendship. Our friendship with our neighbor is threatened. We have hundreds of legal issues with Canada.

We don't need this kind of a garbage issue to deal with on top of all those other important questions. And so we go into action, and we go looking for that guy, and the Attorney General generally gets right along with us, and we go and we try to catch that person and punish him. These individuals, in fact, were prosecuted and sent to prison, and the Canadian was released and sent back. I think the remedies are adequate, the political remedies and all that flows from them are adequate in this area.

Finally, one more point: the issue of extraordinary circumstances is something that must be touched upon. Because even in this area of consent, I would submit to you we are in a world where international law itself is changing. Ten years ago there wasn't an international law relating to drugs that we have today. The international law relating to drugs is different today than it was ten years ago. The international law relating to terrorism is different today. The international law relating to human rights is different today. And the international law relating to self-defense is different today.

And if a bunch of narco-terrorists take the position that they're going to kill my President, or that they're going to send someone here to find him or catch him in Bogota when he's on a visit and kill him, I can tell you as Legal Adviser, I would construe that as a threat to the United States. Whether it amounts to an attack under Article 51 is something that I will leave to others to finagle over. Because in the history of human relations an inherent right is not changed by adding a few words after it, and the inherent right of self-defense has always included the right of a state to protect its nationals and particularly its head of state.

And finally, the issue beyond self-defense, in the human rights area, if you're for international law, you better wake up. If you think that international law is not going to support some of these seizures some day a lot more extensively than some people may want. While some people are arguing for the rights of defendants, which I don't think is going to go anywhere in terms of restraining states from seizing people abroad, the great trend of international law is focused on the rights of decent human beings, people whose moral rights are outraged by inhuman conduct, by monsters who kill innocents, who sell drugs that ravage communities. That's the course of international law in this world, and you better start planning for it because Adolf Eichmann

was only the first of the line of cases in that course of human history.

When there was outrage over the seizure of Eichmann and the state involved went to the United Nations and raised that, and clearly it was a violation of law, what was the remedy ultimately issued and accepted by the state involved? An apology. No payment, no request for his rerendition, nothing. And history now has a precedent that no one questions the propriety of. I mean certainly someone says, oh, well, it was a violation of law, but you go out in the world and ask, is what happened to Adolf Eichmann morally improper?

Even the state involved, in its final statements in the Security Council, made it clear that they were not going to seek more than an apology. So I think we're living here in a world that's dynamic. There are some uncertainties as to what's going on, and I've touched on what I think they are. But the trend, I would submit to you, is one where the courts of this nation and of all civilized nations, and the highest officials of those nations, are going to come back to what counts. And what counts is justice in the great sense of the word.

That is going to either lead states to be more forthcoming in the rendition of these criminals or to the development of international law of external seizures that is far more robust than you can imagine today. Thank you.

Mr. diGENOVA: Thank you, Abe.

(Applause.)

DR. LOWENFELD: I'm sort of debating whether to depart totally from my prepared remarks and respond to the not very subtle accusations. I agree with Mr. Barr that he's not an international lawyer.

(Applause.)

DR. LOWENFELD: I'm not sure I agree when by implication he regards me as a member of a small fringe element. I did after all labor for a good many years on the American Law Institute's Restatement, and with minor exceptions, most of what my colleagues and I wrote was adopted by what you might call the establishment, legal institutions. And Mr. Sofaer, by implication, says you'd better wake up. He did say it, and I think in part he meant me, and I hadn't thought that I was asleep. But let me just start with a couple of propositions. One I think is self-evident. The other, I regret to say, is controversial, though when Mr. diGenova said it's old hat and eliminated, I'm not sure I'm willing to concede that.

The first proposition is that kidnapping is a bad thing. It's a crime. It's a crime of violence. It's an assault on human dignity, and there are

no nice kidnappings. I'll come back to that in a minute. My second proposition is that the Constitution, including in particular the Bill of Rights, governs all conduct of officers of the United States in line of duty. At least figuratively speaking, I think an officer of the United States, wherever he is, carries the Constitution in his pocket as Hugo Black and Sam Ervin, and I, at least today, do. I don't think you can say it's like an overcoat, and when I cross the border I take it off.

It seems that the Supreme Court doesn't agree or at least doesn't agree completely with that. In the *Verdugo* case, the court draws a distinction between the fourth amendment and the fifth amendment. It talks about beneficiaries, and it says, well, citizens are beneficiaries and aliens aren't unless they're resident aliens or have some other affiliation. I find none of that very persuasive, and I think I can give you a fairly simple example. Suppose, for example, the DEA has a program in South America, and it says for that program we reject all blacks. Don't want them. Doesn't matter because the Constitution doesn't apply. I can't believe anybody would support that.

Or suppose they say anybody who works for the DEA in Brazil has to go to Church every Sunday whether he likes it or not. Nobody would believe that. So the notion that somehow the Constitution isn't relevant to American official conduct seems to me really quite unpersuasive. As I wrote in my article in the American Law Journal, I would not have been upset in the *Verdugo Urquidez* case if the Supreme Court—remember that was the case, partly of kidnapping, although that's not what went to the Supreme Court. The part that went to the Supreme Court was that while he was already in American custody north of the Mexican border, some guys, in a joint cooperative venture, and I'll come back to that, too, went to his two houses and conducted a search, a search that apparently would not have passed muster, at least the argument was it wouldn't.

I would not have been upset if the Supreme Court had said what Justice Stevens did, which is to say, well, the fourth amendment prohibits unreasonable searches, and in this context it wasn't unreasonable. I suggested that in my article, and then I had the P.S. in galley. I added something to it at the risk of writing for journals. But the notion that somehow the Constitution becomes irrelevant, I think, is unpersuasive. I think the historical argument induced by Justice Rehnquist is really just not there. I mean he quotes a page from Madison's statement when he introduces the Bill of Rights, and you read it and it just doesn't say what the Chief Justice said it did.

The notion that people is different from persons, I can never even

restate it. It just, I think, is unpersuasive, and I think we'll see that over time they'll take that back. We have a case now, you know, which is technically statutory construction about discrimination and employment, but I think you'll see that those issues just don't come up. But my main purpose here isn't to argue about or reargue the constitutional question. Perhaps I'm too late for that. I don't know. But my point is I think the United States government ought to learn to behave better. I don't think you win the war against thugs by behaving like thugs.

My friend Judge Sofaer says, well, these days things are different. I put in my article—forgive me for repeating for those of you who read it—I put the example of the killers of Mr. Herrhausen. Herrhausen was the most important banker in Germany. He was the chairman of the board of the Deutsche Bank. He was assassinated by terrorists in one of those sophisticated operations where his car apparently broke a beam of light, and that set off a bomb. Now suppose suspects in that terrorist operation show up in the United States. There's no doubt the German government would demand their extradition, and let us suppose they come with probable cause sufficient to arrest the person.

Well, then the suspects go before the courts. We have a variety of defenses. I agree with John Murphy and others that the political offense exception ought to be narrowed. I don't agree with Judge Sprizzo, for example, the way he defines it. But it is certainly possible that a judge might have problems with the political offense exception that there are habeas corpus proceedings. You can appeal from a denial of habeas corpus.

Suppose at some point along the way, the German government gets a couple of agents and puts them on and grabs the guy who, let us say, is out on bail and they find him in Philadelphia and take him back to Germany. I can't believe that the United States wouldn't be totally outraged, would regard such an act as a violation, yes, of the domestic law, Abe, as you say, but also of international law. But now comes the next point: suppose it isn't quite that simple. Suppose the law enforcement officials of the Federal Republic have friends in, say, the FBI or the local police force, and they make a deal. And it is the local officials or the FBI or the police in Philadelphia who put the guy on a Lufthansa plane, and then he's taken back, and when the American government protests, the German government says, oh, there was consent.

I can't believe that that's the kind of behavior that we would accept. This, of course, is a hypothetical case, and it's doubly hypothetical, first, because we haven't seen it, and second because it's with Europe, whereas everything we've been talking about here tends to be

with Latin America. But I'm suggesting that the notion that these are not shared values is just wrong. Now I want to talk for a minute about the *Toscanino* [sic] case. Most of you know the *Toscanino* case in which the Second Circuit said that if allegations of kidnapping and brutality and torture in bringing a guy back from South America were correct, then the U.S. court would have no jurisdiction to try him. In the actual case, as some of you know, he was not able to prove those allegations. And I don't really know the details of that.

Toscanino alleged that he had been blindfolded for seventeen days, and whether he was lying or whether he just couldn't prove them, I really don't know. I don't believe anybody in any of these cases, as I've written. But what I want to talk about is the follow-up of the *Toscanino* case. There were two cases almost immediately afterwards which involved apparently the same alleged conspiracy. One was a fellow called Lujan [sic], and Lujan was lured from Argentina to Bolivia. He was there seized by Bolivians working for the United States. That is, they were some kind of law enforcement officers, but they were acting as agents of the U.S. He was put on a plane for the United States, and he said I'm like *Toscanino*, and the Second Circuit said, well, what happened to you wasn't so bad, you weren't brutalized and tortured. You were merely kidnapped.

I started out, if you remember, my proposition was there are no nice kidnappings. Then, the second fellow, *Lira*, all these three cases within a very short time, he was arrested in Chile. He said he was tortured. There were electric prongs on his bed of steel. He had all kind of horrible disgusting things that happened to him, and then after several weeks he was put on a plane with a couple of DEA agents and taken once more to New York, and he made the same argument, and the court held, well, it's true you were tortured, or at least you made credible assertions of torture, but you haven't proved that the United States officials did it. They may have just been bystanders.

Well, I think both of these cases are wrong. As I say, I think *Lujan* is wrong because it suggests that there are acceptable kidnappings, and I reject that. And *Lira* is wrong because I think we'll never know who did what. I think I've read most of the cases of the so-called joint ventures or cooperations. If some of you want to look at the citations, they're in the notes to section 413 of the Foreign Relations Restatement. And whenever you read a case like that, you wonder what really did happen.

For instance, just to take a not very political case, a case called *Marzano*, the decision says the FBI agents accompanied the local po-

lice superintendent while the latter made the arrest, put the suspect on the plane, seated between two American agents and took him away. Well, who did what? I don't know, and I'm not sure that we'll ever know. We had this problem in the United States in the period between the *Weeks* case in 1914 which essentially developed the exclusionary rule for federal officials, and *Mapp* in the 1960s which applied it to the states. There were lots and lots of cases, if you read LeFevere [sic], he spells them out in great detail where federal officials take evidence and take a person who was arrested by state officials, and the holdings are, if it was truly a joint venture, then you suppress.

And on the other hand, if the government, federal government, got the evidence on a silver platter, then it's okay. It can use it. I think those cases were all unpersuasive, and I think the cases say that the foreign guys did it, and the Americans just watched are equally unpersuasive. Whether it's in a technical sense a partnership, an agency, a joint venture or whatever, I don't know. But I do know one thing. The foreign officials acting in their own country act with much less restraint than they would if they had to bring the suspect before their own courts or their own police authorities. They know that what they do won't ever be tested in front of their own authorities or courts because the guy is going to go on a plane to America.

Well, that brings me—if I can have just a couple of more minutes—to the famous *Ker-Frisbee* doctrine. The *Ker* case, which happened in 1883 in Bolivia, of course, well before our due process revolution, well before the intervention of the international law of human rights, but also interestingly enough, it happened when there was no Peruvian government. Chile was occupying Peru. There was a rump Peruvian government somewhere in the hills. The lady from Peru who's here will know the details of this much better than I do.

But the notion, the Supreme Court suddenly said, well, a claim of violation of international law can only be made by the duly constituted government, has a kind of ironic twist about it, and even if there is a firm government, you get really the classical catch-22 situation. Some of you may remember the Argaud case. Argaud was a former colonel or maybe brigadier general in the French Army who defected and joined the OAS, not the Organization of American States. I forgot what the initials stand for. It was the group that was against de Gaulle because they thought de Gaulle was giving Algeria independence, and he was hunted for awhile, and he was found in Germany and brought in some kind of a bundle in a van, and then guess what, he showed up in Paris, and they picked him up.

And he challenged the way that he was kidnapped, and the court said, the lower court said, well, if you think there is international law violated, that would have to be a protest by the German government. Well, the German Parliament read about this, passed a resolution. The lower court said you're out of time. The pleading—it's too late for the pleading. The Supreme Court in France said, well, the lower court should not have done that. They should have accepted a late pleading in these circumstances, but after all, if the German Parliament is claiming a violation of international law, that can be settled on an intergovernmental basis. Too bad for Col. Argaud.

So I think the notion of relying on the foreign government protest tends to be not meaningful. I think it's also obsolete or at least obsolescent, and maybe here, Mr. Sofaer and I have differing views about the trend of international law. I think we are in a period of ascendant individual rights to international law. We no longer think that international law doesn't care when a country tortures its own citizens, for instance. And so I think to simply say that a suspect has no basis for asserting a violation of international law is, or at least ought to be, wrong.

And third, I think—you say be practical—I think there are lots of reasons why a state may not want to raise the issue of violation of international law or violation of the treaty. Sometimes there's actual consent. Often there is consent at some level, and you don't know at which level. I wasn't here this morning. I just came at lunchtime from New York, but I understand there was talk about the *Alvarez Machain* case. Well, the interesting thing about that case is that the American officials involved in the *Alvarez Machain* case thought they were dealing with Mexican officials. And then the high officials said, no, you weren't. Who will ever know?

I don't know that anybody, that anybody can tell when somebody says we're going to do it, but off the record, and don't tell somebody else. I'm really, I'm suspicious about all those things. I think when we have consent, joint operations should be done by the political branches of the government. I was going to say something about the shortcomings of extradition. You heard that already today. I certainly would like to see extradition strengthened, and I don't need to go over the details of that. I just think extradition has three purposes: it is to protect the interest of the requesting state, the requested state, and individuals, and I don't think you should forget that.

I'm far from being on the side of criminals. Since I wrote my articles, several people have called me up and said would you help us with our brief and so on. And I've said no. And I continue to say no. That's

not my purpose. My purpose is to have my government—it's been twenty odd years since I've been a part of it, but I'm a citizen—to have my government behave properly, and I think in the long-run, it's those values that are the best, that are really the best remedy. I was very moved by the speeches of the two brave ladies from Colombia and Peru. And I think it's no accident that they come to America because America is the country with the lasting values.

I think it's more important to preserve those values than to grab a few thugs who will be replaced by other thugs the next month. Thank you.

Mr. diGENOVA: Thank you very much, Professor. I want to open up a bit of discussion in the time remaining between our panelists, but I want to underscore something that's very important here, particularly in light of the Professor's last remarks. And that is that frequently in our hemisphere, particularly in Central America and South America, the American government receives requests not to extradite people and to use other means of an extraditable nature for political reasons of that host country. It is a very common practice for internal political reasons for those countries that wish that there not be extradition because they don't want to deal with that, and they prefer the rendition method, and they are fully consenting in that process.

And there are recent cases to that effect, which I'm not going to discuss, but they're there, and they're well-known. Bill, you wanted to respond to some comments?

DR. LOWENFELD: What are those?

MR. diGENOVA: I'm not going to talk about the cases that I know about, but the truth is that they are legion.

MR. BARR: I think there are two ways, you know there are two perspectives of looking at renditions. One is from an international law perspective, and the other is from the perspective of domestic law, basically U.S. criminal law. And I think from the perspective of international law, there is very little disagreement, and I agree with Abe's remarks about the importance of adhering to international norms. The United States has a strong interest in developing a just set of international norms that promote peace and stability in the world, and it is a very serious matter with potentially grave consequences whenever the United States chooses to ignore those aspects of customary international law.

Now, let's look at it, however, from the standpoint of domestic law. If the President directs the arrest of someone overseas without the consent of the host government, there are a number of legal challenges

that can be interposed, and that have been interposed. One challenge relates to the legality of the arrest under U.S. law or under international law. And it has been advanced that the United States cannot, officers of the United States cannot arrest people overseas. They lack the power. Therefore, you should throw out the case. It's also been advanced that while they may have the power as a matter of domestic law, they violated customary international law, and a violation of customary international law should be made an exception to *Ker-Frisbee*, and you should throw out the case on that basis.

There have been other constitutional arguments interposed that the arrest is a violation of the fourth amendment, the principal argument being that if it violates the law of the host country or if it violates international law, it is, therefore, unreasonable, and therefore a violation of the fourth amendment. I don't think that line of argument is going to get very far in the wake of *Verdugo*. And then there is the argument that the arrest overseas is a violation of the fifth amendment, and I think *Toscanino* has been greatly narrowed, and basically stands for the proposition that absent extremely cruel treatment by the arresting authority such as torture of the arrestee, that there will be no violation of the fifth amendment.

And what we basically have being played out in the criminal courts of the United States are these attempts to interpose irregularities in the arrests or the apprehension of those people, as a way of escaping trial and ultimately punishment. And what we have in—and I'm not going to comment extensively on *Machain* because it's on appeal right now, but the rendition opinion of June of '89 basically says that the United States does have the authority to violate customary international law, and therefore an arrest in violation of customary international law is lawful under U.S. law, and therefore, it does not provide a basis for the defendant to challenge the jurisdiction of the U.S. court.

I think also the rule of law that is in the United States and will continue to develop is that a violation of customary international law will not provide a basis for escaping *Ker-Frisbee*. That once he had been apprehended, even though there is a violation of customary international law, that's a matter between the states—it doesn't create individual rights in the defendant. The defendant must stand trial. If we have offended the sovereignty of another country, that's a matter between the United States and that country. And that was basically approached in the *Eichmann* case.

In *Machain*, what you have is an attempt to get around *Ker-Fris-*

bee by suggesting that the rendition violated the extradition law, the extradition treaty. And I think basically the position of the United States is that we didn't violate the extradition treaty. We operated outside the extradition treaty. We ignored the extradition treaty. We did not go under the extradition treaty. It was obtained by other means. The second basis of Judge Raffertie's opinion in *Machain* is that you violated the treaty, and the violation of a treaty provides some kind of special exception to *Ker-Frisbee*. That you can violate the Constitution, you can violate federal statutes, but you can't violate a treaty. If you violate a treaty, *Ker-Frisbee* must fold. Now we disagree with that. We don't see a special exception for treaties under the *Ker-Frisbee* doctrine. In fact, it's counter-intuitive.

One would think that violations of the Constitution, the fundamental law of the land, would be more severe, and if anything—

DR. LOWENFELD: But you said it doesn't apply.

MR. BARR: Well—a violation of someone's constitutional rights is more serious, and if anything would give rise to the *Ker-Frisbee* exception. It would be a violation of an individual's constitutional rights, which hasn't been the doctrine under *Ker-Frisbee*, not the violation of a treaty, which basically derives its authoritative nature from the Constitution itself.

One thing that's interesting is to think about our own experience as a federal republic. The United States has had a lot of experience with extradition because of our early experience with extradition was among the colonies, and then among the states. And we do have an extradition treaty in our Constitution, as part of our compact as a Constitution. I think it's Article IV, and we have the procedures whereby one state governor can request another state to extradite somebody back for punishment, trial and punishment. So that's our extradition treaty built right into the Constitution. And let's not forget, while we're dumping on *Ker-Frisbee*, we have a lot more current case law dealing with snatches within the United States, where state governors have filed protests against people being kidnapped from their states, and yet the *Ker-Frisbee* rule has been applied, and that is that even though there is a violation arguably of Article IV of the Constitution, our built in extradition treaty in the Constitution, that's not enough to defeat the jurisdiction of the court.

Just very briefly I want to say two things about points Abe raised. And one is I think Abe is right that—and I think one of the great services he performed in his capacity as Legal Adviser is focusing international law on where it should be focused, the basis of law, all law,

including international law, should be protecting the innocent from predators. And I see all too often among international publicists and international journals and so forth a tendency to treat international law as sort of the strands by which you tie down Gulliver so that the international predators and thugs can use it as a shield and go about the world willy-nilly, and not enough attention paid to how the rule of law must be made to protect the innocent against the predators. And that leads to the other point that I think Abe adverted to, which is the concept of self-defense. Many of the situations where the United States might be tempted—I would not say it would ultimately be the decision—but many of the circumstances where renditions are talked about are situations where we should think about the scope of the right to self-defense and perhaps help the law evolve in a direction where the right to self-defense is understood to permit some of the activities that we're talking about.

Massive narcotics trafficking, sometimes with the complicity of the government or the tolerance of the government, is a threat to our national security, and perhaps, you know, actions of self-defense that are focused on apprehending the wrongdoer and then providing some due process, are a better form of self-defense than more indiscriminate ways of retaliating against that kind of conduct. And the same thing can be said for terrorist activities whereby if you can bomb Qadhafi, then why can't you arrest a terrorist as an act of self-defense.

Arresting a terrorist is far more focused with less collateral damage and more due process than retaliatory measures. That's my response.

JUDGE SOFAER: I think that it's interesting to me that Andy, who I deeply respect and obviously I agree with most of what he says in his articles, that Andy takes exception to the Supreme Court repeatedly, and so do so many people in this field who want to restrain these seizures overseas. It isn't—the notion that people who are opposed to these kinds of seizures want to convey to the world, and the press, of course, joins them in trying to convey this notion—that the government is some kind of a monster that's going out there and acting illegally repeatedly and in every way. Well, the fact of the matter is that the Supreme Court has made clear that certain things are the law, and people are very unhappy with that law, and to the extent that international law is relevant, and it certainly is, the principle of consent is a principle that relates to the state of mind of two states. It isn't a matter that they should have to convince Andy Lowenfeld or judge anybody about. It is a sovereign matter, and I don't understand why Andy needs

to know all these things. Why are you so curious?

DR. LOWENFELD: You told me I should wake up, didn't you?

JUDGE SOFAER: Yeah, wake up.

(Laughter.)

JUDGE SOFAER: Wake up to what I think is a reality that is behind this kind of instinctual notion in American lawyers that the only way to deal with a problem is to give some criminal the right to complain about it in a federal court. That is not the only way to deal with the problem. If we are doing something wrong as a government, as a society, my God, there are plenty of ways of stopping us, and every one of us who serves in the government as a lawyer, who has any guts, and we all do, and certainly the people at this table do because I've seen memos from Joe and Bill, we'll complain and we'll stop things from happening that shouldn't happen.

Isn't that the first test? And if there isn't a lot of complaining, my goodness, why are we letting this guy who maybe watched somebody get cut up in pieces, vicious human being, have some rights that we don't need to give him? Why are we doing it? It's ridiculous. Now, if the state did complain, well, then let's go and deal with that problem because that's a serious problem. In fact, some officials violated the sovereignty of a state and did not have any consent, well, I think that remedies are appropriate and there are plenty of them. Look at the historical record.

Sure, in *Eichmann*, they did not get Eichmann back. I don't think they really wanted him. And I would tell you, though, that very often people are given back, very often, historically. The record is quite extraordinary that when there, in fact, is no consent, these people are frequently given back politically, not because some federal district judge decided that a murderer or someone who participated in a murder, should be given some kind of human rights treatment.'

I just want to accept the hypothetical and let's face it right in the eye. I was the one who raised with Senator Specter this hypothetical of the British coming and taking an IRA suspect because Sprizzo wouldn't extradite him, and Herrhausen's killers would be another one, but not as fair because there we don't have an international treaty, and it isn't clear that they violated an international criminal law. And I think that's a very important thing that when some person who has violated international law concerning which the state involved a duty to extradite that adds a very important international legal dimension, but let's take that hypothetical and I would stand by my position.

I would think the Attorney General would join me, and Bill would

join me in saying we would not seek the exclusion of evidence in the case of a murderer in a foreign court to enable a person to be acquitted in a criminal prosecution for the murder of the banker Herrhausen, whose wife I met at dinner once in my travels around the world, who I sat with and heard her talk about their only child, and had to remember that for the rest of my life that this man was murdered like he was, as viciously and as mindlessly. I would not seek in any way, shape or form any alleviation of his problems even if he were picked up in the United States.

I would protest to the German government, and I would insist on something being worked out that was acceptable to the United States relating to him, but I would think that if he were punished criminally for a crime of that kind of seriousness, it would be perfectly acceptable.

DR. LOWENFELD: May I get in a quick word? Just a couple of quick remarks. I'm really anxious to feel how the parliament feels here. Bill Barr keeps using the word "customary" in front of international law as if that somehow weakens international law. I don't think that's right. I think traditionally customary international law has, if anything, a higher standing than treaty law, and I think without digressing too much, we've got 200,000 troops in the Persian Gulf right now to defend that principle of international law so I think it's a mistake to just depreciate it.

Now Judge Sofaer says, well, I don't like what the Supreme Court does. Of course, it's interesting that the Supreme Court has not heard a kidnapping case as this kind of a kidnapping case since *Frisbee* was a domestic case, and it came to the Supreme Court in 1952 before Earl Warren and before that whole revolution. It's interesting also that the Judge Rafeedie, a Reagan appointee, and as far as I know a conservative Southern California judge, looked at this whole controversy—I mean the whole conspiracy in the *Camarena* case which was certainly a brutal—and said I've had enough. This is the third or the fourth guy they've snatched and stop a minute. And finally Abe's plea about these terrible killers, that, of course, is the whole argument against the exclusionary rule in any case. We can deter the police by punishing them. Mr. Miranda and Mr. Escobedo were not lovely people either.

Somewhere along the line—I'm not a criminal law specialist, and maybe it was a mistake—but somewhere along the line over the last twenty, thirty years, we developed the position that it's better—that we have no other way to make the police behave properly than to say if you misbehave, the suspect walks no matter how evil he is. And I regret to say that I would like to have if Mr. Barr were able to say I'm

going to issue an order that this kind of thing stops, that's fine. I don't make this great plea for the exclusionary rule. My plea is that the United States government ought not to behave in a way that fights crime with crime.

MR. diGENOVA: Let's open it up to some questions from the floor in the little bit of time we have remaining. Perhaps we have generated some interest with this rather lively discussion. Can we speed it up here and ask as quickly as you can?

AUDIENCE PARTICIPANT: Mr. Barr, I believe you also authored an opinion earlier last year that the Posse Comitatus Act doesn't apply outside the United States. Can you put together that opinion with the opinion that you spent so much time talking about here, and I guess the question would be if the President has the authority to order the FBI to act outside the territorial borders of the United States in violation of customary international law, can he do the same thing with the 82nd Airborne? This is self-serving, I realize.

MR. BARR: Yes. The Posse Comitatus opinion dealt with the extraterritorial effect of the post-Civil War, the Reconstruction Era restriction on use of military for law enforcement purposes. And the conclusion of the opinion was that it was meant to be restricted to the territorial United States. That it really was intended to prevent federal troops from interfering in state law enforcement activity. It was never intended to have extraterritorial effect. That opinion was consistent with the only circuit court case that has been decided on the issue as well as a number of Defense Department opinions on the issue.

So under the Posse Comitatus opinion, the military overseas can be used for law enforcement purposes, if they are directed by the President to undertake law enforcement activities. Under our view of it, the President does have the authority to authorize military personnel to engage in law enforcement activities including arrests outside the United States, and, in fact, in the operation in Panama, the President did authorize the military to apprehend people who were indicted, members of the PDF who were indicted in the United States. Now those apprehensions were not made by military personnel, but they did have the authority at the time of the operation to do that.

JUDGE SOFAER: And the government, the legitimate government of Panama, accepted that, agreed to it.

AUDIENCE PARTICIPANT: But the rest of that question was based on that second question. Sir, could the President use the United States military as he could use the FBI in violating customary international law outside the United States?

MR. BARR: Well, strictly speaking, as a matter of law as opposed to whether that's good policy or appropriate from an international law standpoint, you could use as a matter of domestic law, it would be our view that you could use the military then in the same way you use the FBI.

Mr. diGENOVA: Yes, Sir. Please.

DR. ABRAMOVSKY: My name is Professor Abraham Abramovsky from Fordham Law School and I would like to ask you, Mr. Barr, let's assume—let's forget about Germany and England, for a second. Let's assume that you had an Iraqi unofficial delegation coming over to the United States saying that we don't like Aramco people because they have divested our soil against Iraqi law of natural resources, and consequently we're taking four of them with us as guests. Would you say that international law has no part to play over here, and would you rely strictly on the *Ker-Frisbee* doctrine?

MR. BARR: Well, obviously, you haven't been listening to what I said. I think it's clear that under customary international law, that would be a problem for the United States. That would be a violation of customary international law. So, yes, it does have international implications. It's violating international law. It's a serious business.

DR. ABRAMOVSKY: What would you say to the Iraqis when they said to you, and I believe they would, we're relying on *Ker-Frisbee* doctrine?

MR. BARR: Well, see, *Ker-Frisbee* is not a doctrine of international law. It's a doctrine of whether there should be an exclusionary rule in the U.S. courts for violations of law that bring about, you know, where the body has been produced before the court because of a violation of law. It's a domestic rule of law. I don't know whether the Iraqis have a *Ker-Frisbee* or not.

MR. diGENOVA: It would not apply, for example, in Iraqi courts, which I understand don't exist anymore.

(Laughter.)

MR. diGENOVA: It would not apply in Iraqi courts, if that's your question. There's also a secondary question.

JUDGE SOFAER: *Ker-Frisbee* is universally followed.

MR. diGENOVA: There's a secondary question which is that under the conditions which attend in the world today and have for the last decade at least, various terrorist groups from all kinds of countries, Arab and otherwise, have essentially declared war on the United States, in essence, without formal declaration of war, have acted as if they were at war with the United States, and have issued religious gen-

eral warrants of arrest for American citizens all over the world and have taken them into custody, have tortured them, have killed them, have denied them their rights and privileges as citizens of the world.

The United States has acted with exceeding restraint during that period of time, and has seen allies succumb to pressures, deal with terrorists, cut side deals, think they were insulated and subsequently find themselves the victims of terrorist activities notwithstanding their secret faustian arrangements.

JUDGE SOFAER: Our record is not perfect, Joe.

MR. diGENOVA: Indeed, I alluded to that during my own remarks with the regrettable reference to the Iran-Contra affair. The United States, however, retains the right of any free nation to defend its citizens wherever they may be even if, even if it violates the sovereign law of a nation which is, in turn, violating the sovereign rights of American citizens. It is regrettable, for example, that the United States has had in some instances to resort to rendition, but the truth is there are some countries which have purposely acted in violation of all international norms of conduct, and, in fact, if people had a little guts in the 1930s we might not have had the Holocaust.

DR. ABRAMOVSKY: Well, I would agree with you to a certain extent, and you're sort of preaching to the choir a little bit because I'm of Israeli background myself. But the thing is, what I'm trying to ask is this. In this particular situation, *Kerr*, would you agree was a fluke case?

MR. BARR: No, it's been followed repeatedly in the courts.

JUDGE SOFAER: You can look at the domestic law of every foreign country.

DR. ABRAMOVSKY: I know that it was followed by the American courts.

MR. BARR: It was also followed by foreign courts.

JUDGE SOFAER: I don't know of any foreign court that doesn't follow the same rule.

DR. ABRAMOVSKY: Well, I could think of a couple who don't, but the thing is, you know, let's get away from that for a second. Would you say that the *Toscanino* exception—

JUDGE SOFAER: It comes out of the Roman system. I mean it's not just something that was made up in the 1930s.

DR. ABRAMOVSKY: I understand. I just wanted—

JUDGE SOFAER: It's an old thing, you know.

DR. ABRAMOVSKY: Let's go one step at a time. You say that the *Toscanino* exception, although well meant, has never been applied

in any case in the United States, even when medical records have been presented—

MR. BARR: Well, as I said, the *Toscanino* case, I think, has been substantially narrowed, and now requires egregious conduct, and to the extent, and basically the United States has a good record. We don't engage in that kind of conduct.

JUDGE SOFAER: You know the reason all those people keep calling Andy to help him with their cases is because they figure Andy's only motive must be to be going in the business of criminal defense law. They can't understand any other purpose in his taking the position he takes.

(Laughter.)

DR. ABRAMOVSKY: I would believe that, and believe me that I'm not a spokesman for the Guadalajara cartel or any other. But the notion that I'm getting at is I think that there's a substantial difference when you're talking about the regular rendition, which is this sub rosa agreement on the bottom between two law enforcement agencies, which is either affirmatively supported by the asylum state or acquiesced to by the asylum state, or in the case of Alvarez, we're into Mexicans, who said, hey, this one is out. Now the question is, the next question that I have, do we have a little bit of a double standard over here saying, well, when it comes to Canadians and *Jaffe*, the Canadians are little bit more cultured? They're a little bit more humane? They're a little bit more trustworthy? They're a little bit more whatever?

Are we saying that, okay, but in the case of Mexicans, right, even though they feel that their sovereignty and their territorial integrity has been violated and they're saying—and I have no reason not to believe them—that they will prosecute Machain to the full extent of the law, here we're not going to repatriate a la *Jaffe*. Is there or do you feel that there is a sort of—and I'll ask Abe Sofaer the same thing at the same time—is there a little difference over here? Is there a double standard?

MR. BARR: Well, as I said, I'm not sure there's a double standard and I don't want to get into Mexico, but let me say generally that Abe raises a good question. Why should the consent of the state or whether in fact there was consent bear upon the jurisdiction in a subsequent criminal proceeding? That's really a matter for the sovereign states to deal with, and, you know, unfortunately we live in a world where sometimes it's very difficult to ascertain whether we have consent or not. We may hear: and that's why I wonder why that should be the pivotal rule for an exclusionary doctrine.

Suppose we're told by a country, look, you can have this guy, but

as a matter of, but publicly, we have to complain because we're going to get zapped by these terrorists? Our Arab brethren out there aren't going to like it if we're playing footsie with you. So you can take them but don't ask us. We may have to protest it just to cover ourselves on that. What are we supposed to do? Or you may have a situation where, in fact, we do get consent from an element of the government, and then there is a subsequent debate in the government and there is political embarrassment, and although they, in fact, legitimate officials consented, and we thought we were operating with consent, they changed their mind. Or in some cases you could have bribery of foreign officials, because in the drug area there's a lot of money washing around.

So it's very hard to go back and reconstruct exactly what the state of mind was. I think Abe's point was that as a matter of international law, if a country ultimately determines or wants to take a public position that its sovereignty has been violated, the remedy is between the states. That's what international law is all about.

DR. ABRAMOVSKY: So you think that Mexico should—

MR. BARR: There should not be an exclusionary rule in criminal law.

DR. ABRAMOVSKY: So you think that Mexico—rather than to the Justice Department, the courts, et cetera? Is that the answer?

MR. BARR: Excuse me. I didn't hear what you said.

DR. ABRAMOVSKY: What I'm saying is did Mexico do wrong or err?

MR. BARR: I didn't say anything about Mexico. I didn't say anything about Mexico.

DR. ABRAMOVSKY: No, but I'm talking about Mexico. Insofar as Alvarez is concerned, should they have gone directly to Baker and forgotten about supervisory powers of federal courts, forgotten about the fact that there is a right, you know, for an individual, albeit he's accused of nefarious offenses? I'm sure this is not a great human being. Is there some sort of a problem of going through the judicial system concomitant—

MR. BARR: Well, the issue is whether—I'm saying there should not be an exclusionary rule for the body of a criminal to enforce international obligations between states. Customary international law does not create individual rights. It deals with the rights between states.

DR. ABRAMOVSKY: Precisely. But the individual derivative right—

JUDGE SOFAER: Could I just say—

DR. ABRAMOVSKY: Just one second—derivative right, okay,

which is then followed by his government. Here you have the government saying—I'm sorry—but here it's not just Alvarez just like it was in *Toscanino*, like it was in all the other cases, here it is the Mexican government itself saying you violated our territorial integrity and sovereignty. We are not going to bring this guy and throw a bachelor's party for him. We are going to incarcerate the man. We're going to prosecute him to the fullest length of our laws. And now they're under the magnifying glass.

MR. BARR: Well, I'm not going to talk about the Mexico situation. As I say, again, there are two ways. I think Abe's point was correct that if there are violations of international law, there are remedies. We should not adopt an exclusionary, some exception to the *Ker-Frisbee* doctrine.

JUDGE SOFAER: And incidentally, we have given back people that were seized in Mexico several times in the last hundred years, several times.

DR. ABRAMOVSKY: Okay.

JUDGE SOFAER: In fact, generally we have given them back.

DR. ABRAMOVSKY: Thank you.

MR. diGENOVA: Thank you. Thank you very much, ladies and gentlemen. We appreciate it.

(Whereupon, at 5:15 p.m., the meeting adjourned, to reconvene at 9:00 a.m., Friday, October 12, 1990.)

American Bar Association Standing Committee on Law and National Security and Center for National Security Law, University of Virginia School of Law

A National Security Conference
Strengthening the Rule of Law in the War against Drugs and
Narco-Terrorism
Day Two
Friday, October 12, 1990, 9:05 a.m.
International Center, 1800 K Street, N.W., Washington, D.C.

I. PARAMETERS FOR THE USE OF MILITARY FORCE . . . 863

Moderator: Delbert Spurlock, Law Offices of Gregory D. Thatch
Speaker: Terrence O'Donnell, General Counsel, Department of
Defense

II. ROUND TABLE DISCUSSION: TOWARD NEW LEGAL INITIATIVES 869

Moderator: John Norton Moore
Speakers: David C. Jordan, Professor, Government and Foreign
Affairs, University of Virginia, Former U.S. Ambassador
to Peru
Patricia Shapiro, Agency for International Development
Kenneth W. Bleakley, Senior Deputy Director for
International Communications and Information Policy,
Department of State
John McGinnis, Deputy Assistant Attorney General,
Department of Justice

III. GENERAL CONFERENCE SESSION/AUDIENCE DISCUSSION 894

Discussion Leader: John Norton Moore

I. PARAMETERS FOR THE USE OF MILITARY FORCE

MR. SPURLOCK: It's a great pleasure for me to chair this panel,
which I think is an extraordinarily significant one. Our hemispheric
partners perception of our commitment to the rule of law will to a sig-

nificant extent be governed by the way in which we use our military forces in the hemisphere. And what complicates that issue for us is that we're dealing in our country with a multiplicity of agencies performing a multiplicity of functions under multiple legislative mandates, and we've heard some comments in previous panels about the lack of oversight or coordination in terms of those multiple functions and agencies.

And added to the equation as far as the use of military force is concerned is the fact that we've created some extraordinary capabilities within the Department of Defense which are capable of being used in the drug war and against narco-terrorism. Most specifically I'm referring to the new special operations command, which now has its internal intelligence or organic intelligence capabilities, and which has the capability of operating covertly.

Additionally complicating application of rule of law are the new technical means which have been developed during and in response to the Soviet threat and which are now capable of being used in these efforts. But U.S. persons are so intimately involved in hemispheric commerce and normal relationships that our intelligence capabilities can come under the same kind of scrutiny encountered during the late '60s and early '70s. The credibility of our commitment to the rule of law, I think, will be significantly determined at least in the eyes of our hemispheric partners by the way in which we use these military structures. The seriousness and meaning of this issue as it relates to the overall topic of this conference is exemplified by the responsibilities and the scholarship of the members of this panel.

Terrence O'Donnell is the Department of Defense (DOD) General Counsel. He's coming up on his anniversary, which I believe is October 30, in that position. He's a graduate of the United States Air Force Academy, Georgetown Law School. He served in Vietnam where he was honored as a recipient of the Bronze Star. He was a special assistant to President Ford and from 1977 to assuming his position in the Department of Defense he was a partner in Williams & Connolly. Mr. O'Donnell.

MR. O'DONNELL: Del, thank you. I was asked to address the program now in place at the Department of Defense with respect to the counter-narcotics mission, and to briefly address the legal parameters and limitations under which we operate on a day to day basis. Last month, as many of you know, the Department marked the first anniversary of its enhanced commitment to international counter-drug effort and counter-narcotics mission. The Secretary of Defense, Secretary Cheney, on September 18 of last year described the effort as a "high

priority national security mission.”

Those words in the department are extremely significant because, for the very first time, the leadership of the Department have identified and described this counter-narcotics effort as a national security mission. As all of you know, the military has been involved in counter-narcotics efforts for quite some time. But it's fair to say that involvement did not represent a full departmental commitment with the blessing of the Secretary and the President, as a national security mission.

I think we have made significant progress within the limitations that we must live with over the period of the year in attempting to define and pursue this mission assignment. Actual Department expenditures for counter-drug activities have increased from roughly 425 million in FY '89 to 875 million in FY '90, and DOD expects its budget for '91 counter-narcotics activities will exceed a billion dollars. The actual expenditures of the department in support of those activities in '91 will probably approach two billion when all training activities and related activities are taken into account.

The increase in the DOD counter-narcotics budget has been accompanied by a drastic increase in the level of DOD support to the counter-drug effort. The Department has placed particular emphasis on assisting the Andean nations of Colombia, Bolivia and Peru, the source of virtually the entire world's supply of cocaine. While much of the support currently being provided by the armed forces is classified, I can tell you, for example, that the Southern Command has sent some 49 mobile training teams to train South American counter-narcotics policy and military forces in such areas as air intercept, operations, riverline operations, the use of radar, communications, and intelligence.

Logistic support to various joint U.S.-host country operations has also increased significantly. The Department has emphasized its human intelligence and analytical intelligence capabilities in support of the U.S. counter-narcotics activities. In addition, DOD has provided approximately \$65 million in draw down of equipment, training and related services to Colombia under the Foreign Assistance Act, including C-130, A-37, and UH-1 aircraft, assault boats, fuel trucks, sidearms, ammunition and the like. The President recently directed delivery of another \$53 million in similar support to Colombia and five other nations in the region. During the past year, the United States armed forces have steadily increased their effort in the fight to intercept drugs in transit to the U.S., as well.

The Department has applied a wide array of technical assets in this mission including Airborne Early Warning and Control System

(AWACS), aerostat radar balloons, and an expanded interagency communications network. DOD reconnaissance activity since '89 has increased to over 3,800 ship steaming days and 40,000 flying hours in 1990, increases of approximately eighty percent and 100 percent respectively. AWACS flying hours dedicated to the counter-narcotics mission have grown from 38 percent to a high at one point during last year of approximately fifty-one percent of the total AWACS flying hours available to the Department of Defense.

A particularly important need of the many law enforcement agencies has been the challenge to find a way to communicate with each other and to transmit up to the minute intelligence. DOD is now over two-thirds of the way to completing a secure interoperable communications network called ADNET allowing federal law enforcement agencies to talk with and send data to each other instantaneously. Originally, eighteen ADNET sites around the country were planned. Due to the success of the system, 75 sites are now planned and 48 are currently operational.

Eventually, the system will be available to agents in the field who will be able to communicate in secure fashion from lap-top computers operating via cellular telephone. This communications ability is an area where the military has been able to help significantly. The agencies, I think it is fair to say, simply were not wired together in the past. Translating intelligence into operations and action quickly is essential in successful counter-narcotics operations. Along the southwest border, Joint Task Force Six was established in November, 1989 in El Paso, Texas to spearhead DOD support to the law enforcement agencies in this critical area of trafficking.

This is the third DOD Joint Task Force dedicated to counter-narcotics. Working closely with Operation Alliance, a consortium of federal, state, and local border state law enforcement agencies, the military has supported numerous requests by law enforcement agencies for assistance along the southwest border. DOD missions have included long-range border patrols, tunnel detection, surveillance, cross-training of military and law enforcement personnel, and improvements of border access roads. In May of this year, with the help of the tunnel detection equipment provided by DOD, a joint Customs-military mission uncovered a football field long concrete tunnel under the Mexican-American border: a major artery for transport of drugs from south and central America to the United States.

I visited Joint Task Force Six, and saw that they operate under significant problems. For example, on the inside of the Texas-Mexico

border, approximately ninety percent of the land immediately contiguous to the border is private property. The Immigration Service and border patrol can cross and access that property. The military cannot.

The question of whether Congress will provide legislation to permit the military to carry out its mission, which Congress has directed, to train to the maximum extent possible in border areas, is a difficult one. Should the military transgress private property? It's a difficult issue. Fifty percent of the entire border between Mexico and the United States is private property. So while DOD is permitted to conduct training missions and other activities on the border, we cannot access that property without permission of the landowners. And there is reasonable basis to believe and good intelligence to support the notion that private land is being used to receive narcotics that are being run through a very porous border.

If you ask a landowner for permission, and if that landowner is engaged in illegal activities, you can be sure that either the answer will be no, or if the answer is yes, he's not going to be running any operations during the period of time that the military is training with night vision capability on his property.

In addition to the operations conducted on the border, the Atlantic Command in the Caribbean, the Forces Command on the Southern Border and the Pacific Command in the Pacific have also been actively engaged in counter-narcotics activities. Those commands have been directed by the Secretary of Defense that counter-narcotics support is a mission—not an activity—that will be pursued. It is a high priority mission. These activities are indicative of the changing role of the Department in the fight against drugs. In recent years, we have witnessed as well a gradual expansion of DOD's legal authority to assist in the fight, both at home and abroad.

In 1982, Congress began to loosen the nineteenth century strictures of the Posse Comitatus Act, which prohibits the use of the Army or the Air Force to execute the law except where expressly authorized by the Constitution or by statute. Specifically, in the area of drug enforcement, it authorized a "slight narrow departure" by permitting DOD personnel to operate equipment in support of drug law enforcement operations. It also authorized the transportation of law enforcement personnel outside the United States to enforce the drug laws, but only in conditions determined by the Secretary of Defense and the Attorney General. However, the 1982 law prohibited military equipment from being used to interdict or interrupt the passage of vessels or aircraft and specifically prohibited military personnel from participating

directly in the interdiction of such traffic, or from participating in search, seizure, arrest or similar activity unless otherwise authorized by law.

DOD was further prohibited from providing assistance if it would adversely affect the military preparedness of the United States. From this cautious beginning, the opening in the *Posse Comitatus* wall and the principles behind it has increased, and has slowly widened as competing factions in Congress have struggled over the proper role of the military in the war on drugs. In the 1989 National Defense Authorization Act, Congress continued to expand the Department's role by making it the lead agency of the federal government for the aerial and maritime detection and monitoring of the transit of illegal drugs, rather than interception, interdiction, arrest, search and seizure.

Congress also established a requirement that the Department, to the maximum extent practical, as I mentioned before, take into account the needs of civilian law enforcement officials when planning and executing military training exercises. So we are attempting wherever possible to schedule training exercises using night vision devices and the like in border areas and to conduct reconnaissance training missions in a manner that serves the needs of the civilian law enforcement authorities.

The congressional conferees, however, rejected proposals that DOD directly participate in domestic law enforcement activities and termed that proposal a radical break with the historical separation between the military and civilian functions. The conferees noted that "the American experience has been marked by a traditional and strong resistance to any military intrusion into civilian affairs." Thus, the Department of Defense was instructed to continue providing indirect support in the form of intelligence, equipment, expertise, training, and the like. As international drug cartels gained prominence, and as countries in the Andean region were further subverted by their activities, we have received some additional authority in the international arena. As you know, in 1989 the Department of Justice issued a legal opinion which concluded that neither the *Posse Comitatus* Act nor the prohibitions of section 375 of Title 10 apply outside the territorial jurisdiction of the United States.

The significance of this opinion is that the criminal proscriptions against the use of the Army and Air Force to enforce criminal laws does not necessarily apply outside the United States. There are many other implications to military action outside the United States which were addressed by Mike Matheson. I'm going to skip over these so we

have time for questions and a discussion of domestic law as it pertains to some of our international operations. But note that the Department of Defense in the last year has taken so seriously the mission assignment from the Secretary of Defense that it is beginning to organize the effort as if it were a war effort; with intelligence communications cells within the Joint Staff and within the unified commands.

But make no mistake about it, the Department labors both domestically and internationally under numerous policy and legal restraints, which in significant ways undermine the type of assistance we can perform. We also operate with respect for the sovereignty and the expressions of that sovereignty of the countries in the region and with respect for their air space. We operate under limitations that have been negotiated and placed on the nautical mile standoff under which our ships can approach the land mass and perform intelligence, tracking, boarding operations and the like. These are very significant factors. The answer is one of continued pressure, negotiation, training, and working with these countries to make the effort more effective.

I think intelligence capabilities of the military are enormous and can perhaps be the single factor that can make the difference in this war on drugs. But intelligence has to be able to be translated into operational action, and we are not, we are precluded from going out and participating in specific operations in these countries to interdict laboratories and to interfere with the cartels' activities which are carried on with impunity in these countries. But we can train and support—and that training and support is much needed in those countries if they are going to effectively deal with the internal power and growth of the counter-narcotics activities within their borders. Thank you, Del.

MR. SPURLOCK: Thank you, Terry.

II. ROUND TABLE DISCUSSION: TOWARD NEW LEGAL INITIATIVES

DR. MOORE: Let's begin this panel. The important objective of this conference is to begin to focus more specifically on what it is that we might do by way of new initiative that could make a difference. How can we have changes, either in policy or new articulations of policy, or changes in the legal structure and suggestions for such change, that might make a difference in this struggle against narco-terrorism?

We have a particularly distinguished and experienced panel with us today. I'm going to follow the order as they are appearing here on the program, and we'll start with my colleague on the Government and

Foreign Affairs faculty at the University of Virginia, Ambassador David C. Jordan. Ambassador Jordan was the United States Ambassador to Peru in March 1984 to July 1986. So obviously he has hands-on experience in this whole subject matter.

Long before he became an ambassador, he was a colleague that many of us in Virginia working in international affairs depended on particularly. He was, for example, the chairman of the Department of Government and Foreign Affairs at the University of Virginia from September 1, 1969 to August 31, 1977. He is certainly one of the nation's top experts in Latin American affairs. He was a member of the Founding Committee of the Latin American Studies Association. He has written extensively in the area of Latin American and national security affairs and international relations. I could go on and on as to all of his extensive qualifications, but I think it would be more appropriate to hear directly from one of the nation's top Latin American experts, Ambassador David Jordan.

AMBASSADOR JORDAN: Thank you, John. The more I looked into the problem of coming up with solutions, the more frightened I became at the magnitude of that problem. I thought what I might do briefly for you is to give you a very straightforward assessment of what I think is the scope of the problem and the problem of the United States government's political culture, the organizational deficiency in our government, the lack of political will, and our society's overall responsibility.

First of all, looking at the scope of the problem, everybody talks about this over and over again in the context of the supply and the demand sides of it. We all have seen from the discussions thus far in these various panels how many different agencies in the U.S. government are involved, and how many different aspects of the problems they face. Let me give you briefly, for example, the situation in one country such as Peru.

The United States historically had both a crop eradication program and an enforcement program. It was also trying to assist the country's economy, which was increasingly collapsing. It had a democratic problem trying to stabilize the nation's democracy. It was dealing with a country that might lead a debt cartel in terms of the United States in the context of a growing problem in terms of the payments of overseas debts. The United States faced all of these kinds of problems and, in effect, had multiple objectives with respect to its drug agenda and its other substantive policies without a way of absolutely working out a coordination between them.

My instructions, for example, included breaking the Soviet connection, which had over a \$3 billion military investment which required a whole series of purposes and policies on the part of the United States government. At the same time, we were supposed to stabilize the government and have it pay its debts and destroy its largest earning crop for the government, where you obviously were recognizing less than full desire to do that on the part of the government, even though it provided lip service to it.

Now that's just to briefly give you a sense of the problem of multiple objectives and multiple agencies. I would like to talk to you briefly about what I would call the U.S. government's political culture. The first acronym that I encountered when I went into the United States government was CIA. I like to put it this way: The greatest myth was the sign that was placed on President Truman's desk which says "the buck stops here." The whole objective that I encountered in the United States government is what I would call "destruction of the buck."

If there can be any problem, you will become a problem if you pass the buck. Buck is the main thing that has to be destroyed. For example, anyone who has had some experience probably watched with great interest the latest and probably one of the more recent public examples of buck I have seen. The buck suddenly seemed to fall for Saddam Hussein on the American ambassador. Then the buck went to the Assistant Secretary of State. That pretty well got passed up almost immediately to the Secretary of State and the President, which got sabotaged by an article in *The Wall Street Journal*. Then it got shifted to Congress, which got its transcripts published with respect to its visit, and the buck finally got destroyed by passing it on to the U.S. farmers.

What we have, in effect, is that you want to be part of the action, but you don't want to be responsible for it. And that requires knowing how to handle the buck. So our first issue here is the whole question of being able to have some responsibility, to have some action, but not being able to have responsibility for any of the adverse consequences.

That's why State can make progress, but the problem gets worse. DEA can make progress, but the problem gets worse. Every agency can report progress, but it gets worse. Another example for us was in terms of our crop eradication program. What I couldn't figure out was how we ever got to the figure of 60,000 hectares to eradicate. The target was 6,000 a year, and then obviously the problem would be over in ten years.

The problem, of course, was we would eradicate. We'd get 5,000, but the next estimate we had was 120,000, and, of course, then the

problem was how do you figure this out. So it was intelligence that became the problem because they haven't told us what the proper number of hectares was. So we passed this stuff around and around and around. So my first sort of general statement for you is that the government, in terms of the straight foreign policy line of the thing, has to have some idea of what its objectives are and someone has to get the buck. Ambassadors don't want it.

Now, the next aspect of the scope of this problem is the retreat or the flight to multinational issues. They say, well, we'll give it to the U.N. Don't hold your breath. The U.N. will take what it wants to take, which is what I would call the soft target. What we found the U.N. wanted to do was to get only involved a little bit with some kind of experimental program with alternative crops, but it didn't want to be linked in any way with enforcement or anything that might make it a target for anything else. So your problem is if you're going to rely on the U.N. for initiative, I am afraid you're in for a slight disappointment.

Also, in terms of the international dimension, I think one of the more promising areas is clearly the international financial regime. But if you look at that, and you go through and you look at Kerry Amendments and you look at Vienna Conventions, and you look bilaterally, the essential motivation behind it is some sort of coercive punishment pattern. Now the problem with the coercive punishment pattern, you can always see in the ABA reports is the bankers are saying, look, just when we're getting into the system of freer transactions and all the rest, along comes the government and wants to squeeze down on us and find and impute to us all kinds of motivations for why we're committing offenses to get around it.

Some of them will tell you it looks to them like a lawyers' employment act; that they will find out and have to be trying to protect themselves for how they are transmitting funds. I suggest, and this will be the general idea here for you, that what you've probably got to do with respect to greed is fight it with greed, and try to find some kind of incentives in there for them to get a piece of the money that they're going after to make sure that they would find, kind of a push to pick it up or track it.

Within this, there's also an enormous aspect that involves American domestic responsibility. I'm convinced that the American public does not know, for example, the full implications of what the Marion Barry trial had for our standing with respect to going out there and pushing on governments to curtail economic activities and crack down

on people when they basically look at the United States' attitudes on the drug consumption situation as barely ludicrous.

So we have there, in terms of the spectrum of the problem, something that encompasses an enormously complex implementation side in the foreign field, a number of false starts probably in the multinational regime field, and a clearly inadequate domestic attitude toward the consumption and use of drugs. Now, the second area on this that I'd be talking about is in terms of taking some kind of initiative, since clearly this thing is organizationally fundamentally inadequate.

I do not mean to impugn individuals' or groups' efforts or attitudes. But the position that's been allocated for coordinating this effort does not even have Cabinet status. It has a primitive staff, and if you really look at the efforts that are going to be involved, they've got to have assets from everything from Education and Agriculture to Defense, Justice, State and the rest. So what you're really looking at here, from an organizational structure, is no clear indication that the United States is serious whatsoever in having some kind of a structure that would coordinate and provide a forum for discussing all these extraordinarily complex problems.

Thirdly on this—which is linked to my area—is the lack of political will. This is a very complicated problem. I suspect that what you really have when you determine will is budget allocation. It's sort of a standard political science measure to say that you've really allocated values in your political system when you fund them. Recently, we have had an opportunity to see what we do when we do go to war, or what we think we are about to get in the Middle East. Command and control is centralized. Assets are moved and mobilized, and in terms even of the conflict area, if you know the way the structure is, usually the ambassador would have overall command with respect to the problem of, let's say, Saudi Arabia. You put in a military operation. He doesn't run it. It's now directed in terms of the operations designed to meet that war or conflict, and it is something that is outside of the normal way you do things.

So you have some idea of what it is you do with respect to waging a war when you have political will and you go about deciding to do something about it. Now, normally what I think is the case when you have something like this—and you don't have the budget allocation—is that one month of Desert Shield is more than the entire budget for the war on drugs. You ask what's going on, and you say, well, obviously the issue is still a rhetorical one for your political leadership rather than one of fundamental commitment. So if you don't have the alloca-

tions that are made to the conflict that demonstrate the allocation of values, you do not have a full commitment. You are managing the problem, not attacking it.

Now in that regard, you get to the fourth area of where I see the responsibility lies. I suspect that most of us agree that politicians and leadership react to heat from below, and if there is not enough heat there, they're not going to do the things that they think are necessary for the policy agenda. So ultimately in this, if we are becoming serious about what this problem is all about, there is a societal responsibility, a responsibility for the elements of society to begin to address what this is all about.

Now let me just give you some ideas of how devastatingly dangerous this thing is to the United States. One of the things the Americans are still relatively unaware of, although Bennett has been putting this stuff out now increasingly, is what this is doing to American children. We are looking at better than ten percent of the American live births that are now addicted. When you start adding that up in terms of the cost to society, it is going to become absolutely astronomical.

If you look at the other aspects of it, one of the things in terms of education, and I'm just going to touch on this briefly because obviously I don't have a great deal of time for you, but if you're going to be serious about this, you've got to realize that the United States as a society has got to be supporting those values in the American population that are self-restraining. If you continue to support, and if the United States and if massive amounts of money and the popular culture continues to move towards self-indulgence, then the social structure, the social value system, and the rest, reinforce the problem that drug activity is exacerbating. And the society is failing in providing the moral structure whereby its own people are going to be able to provide the milieu to resist it.

And therefore, whether you realize it or not, you will also be undermining the pressure you're going to be generating on Congress because the more it sees its own society disintegrating, the less there will be a coherent expression of outrage and protest to what is happening in the culture at large. In addition to this, you have to stress the problem of what is occurring with respect to the security involvement. People are now aware, for example, of the Bloods and the Crips in Los Angeles. The Bloods and the Crips type problems are emerging into the smaller cities and towns of the United States and we are going to have an increasingly massive security problems inside as more and more groups move into this type of activity throughout our societal structure.

Very briefly, my sort of five categories of recommendations are as follows: one, there must be an organization to coordinate the complex interaction of the domestic and international anti-drug fronts. In other words, you have to have a system that coordinates the problems of multiplicities of objectives inside the program itself as well as with respect to the other agendas of the United States government. This structure must be able to use all the agencies, departments, and other U.S. assets in the coordinated way with direct support and accountability to the President and Congress. So I've been talking, and I'm really thinking here, in the context of a new type of National Security Council structure. The head of this, however, would not be someone like the NSC chief, who is not approved by Congress. You want to give him the same status in terms of his coordinating arrangements as you give an ambassador or you give a Cabinet head. It's a presidential appointment approved by Congress so everybody is on it. It's got to be a special organizing structure, and it's got to be the plug into and have access to every single one of these kinds of assets that impact in terms of the United States' domestic and international structures.

Two, the policy with respect to producing countries must have a coherent consensus on attacking the full range of producing problems. If the relative priorities, for example, the United States government *vis-à-vis* debt, democracy and development of drugs are not thrashed out, then each country's problems will be approached in terms of purely ad hoc settings of priorities. Most of you will see that this stuff is not done—and you don't have, in terms of the U.S. government, anybody to say, look, how do you handle the problem. I've got a government here. I know this guy is trying to stay, but he can't go after his growers right now, he's running for elections. What do you want me to do? So, it's got to be discussed. It can't be sort of hidden underneath so that the buck system works.

Three, we need as a promising area a coherent international financial regime. This has to be constructed. Most of what I've suggested of the existing net regime are based on penalties and punishments. What I think here is a necessity is to move this in terms of an incentive pattern or incentive system of some sort that will involve these guys in going after this stuff because of greed, not because of fear that you're going to haul them into court. Then they'll become increasingly, by abstraction, part of your problem because they're going to always be scared and they're not going to cooperate. It's sort of my view of the human nature of these things.

It's a sort of CIA in the State Department. These guys aren't cyn-

ics. They're scared. That's what they are. They don't want to have their throats cut, and they want to go up. You know, narcotics is a dead end. When we were in there, we tried to make it so that we were able to get one guy in INM to get an ambassadorship because most of them say if we get in there and nothing works, we're going to die.

Four, we've got a huge responsibility in our domestic sector where we've got to start networking all those groups in our society that are concerned about this. They can't keep operating alone. For example, we started worrying about kids in junior high school and watching the druggies and all of the crazy attitudes that were in there. It was creating an environment in terms of the way the teachers behaved and the students behaved in which you had to consciously fight drug value culture. Look what the UN is promoting. This whole John Lennon thing is part of the drug culture of our society. So we have got to get serious about this. In that context, we should start talking about drug testing. But when you have got all this permissiveness out there, you can't go anywhere with it because everybody says, God, my rights.

Five, we've got to recognize that our constitutional legal-political system cannot undergird the society to destroy the predominant value system in the United States of self-restraining activity. To the degree our system is increasingly encouraging a domestic social environment that is self-regarding and selfish, we are in trouble. Thank you.

(Applause.)

DR. MOORE: Our next panelist is Pat Renee Shapiro. Ms. Shapiro is a graduate of the Yale Law School where she served as the editor of the Yale Law Journal from 1982 to 1983. She has been in private practice in both the United States and Japan, and currently she is the attorney adviser in the Office of General Counsel for AID, and one particular area of responsibility of hers is narcotics-related legislation and policy issues. Pat Renee Shapiro.

[The following is a summary of Ms. Shapiro's comments:

Ms. Shapiro is with the Agency for International Development which is a foreign affairs agency of the U.S. government, involved in administering economic assistance programs overseas to developing countries. She spoke of the importance of dealing with the drug supply, since most of the illicit drugs consumed in the U.S. are coming from foreign countries, more specifically developing countries. These developing countries have very low per capita income and GNPs where economic production and sale of narcotics represents a major part of their income.

In order to deal with the narcotics problem the United States must

do two things: first, it must provide economic and financial assistance to these countries in order to free them from their dependence upon narcotic production. This may be done by reducing the restrictions that we traditionally have placed on promoting crops which would compete with the United States, and providing these countries with diversified crop alternatives as well as other economic income substitutes. Second, the United States must educate these countries as to how narcotic production adversely affects their own countries.]

DR. MOORE: Our next speaker is Kenneth Bleakley. Ken Bleakley is a senior Foreign Service officer now serving as the Senior Deputy Coordinator and Director for International Communications and Information Policy. Previously, he served as the Deputy Assistant Secretary of State for International Refugee Assistance and Deputy Director of the Secretary of State's Policy Planning Staff. He was the Deputy Chief of Mission at the U.S. Embassy in San Salvador from 1981 until 1984. Mr. Bleakley served in Washington as the Deputy Director of the State Department's Operations Center, as the Special Assistant for East Asia and Pacific Affairs, and in the Office of the Secretary of Defense. Other overseas assignments that he has had include Panama, Bolivia, Spain, and the Dominican Republic.

I will not go into a lot of the other very impressive background in his career. Let me just say that he has also served as a former President of the American Foreign Service Association, and is certainly one of the most highly thought of members of the Foreign Service of the United States. It is a great pleasure to introduce Mr. Kenneth Bleakley.

MR. BLEAKLEY: "A pound of gold, Señor, or an ounce of lead." That's the choice that many of the participants in criminal justice systems around the world face when they're dealing with narco-terrorism. It's not surprising that to a greater or lesser degree many systems fail when they're presented with that sort of a challenge, and we're seeing the results of it today in ways that Ambassador Jordan has outlined, I think, fairly impressively, as to what the impacts are on our own society and the societies around the world.

Meeting the challenge of the pound of gold offered to impoverished people everywhere is the type of work in which the Agency for International Development has been engaged. Ms. Shapiro, I think, has outlined very nicely some of the attempts we're making there. What I'd like to address today is this question of criminal justice systems of other nations. What happens when they fail? What can we do to support other nations' efforts to restore those systems to health? What can

they do for themselves?

My experience in El Salvador, where every element of the system failed with disastrous results for the people in El Salvador and for the rest of the world, demonstrates that when a system collapses it's not easily repaired. It's an enormous job. Even with the dedication of a government committed to reform, with the dedication of attorneys and other concerted citizens, with the support of friendly nations, attorney generals of the United States prepared to commit themselves to the effort and participate in it, and the United States to back it up with our own assistance funds—even then the system is hard to restore.

And so when we face nations around the world today who have to address the challenge of narcotics and terrorism, intertwined as they are, you face a problem that is, indeed, daunting, and that does require the sort of coordinated, integrated approach that was outlined by Ambassador Jordan a few minutes ago. Let's take it step by step and see what goes into this. These are my recommendations as to where we begin our initiatives.

First, the training and equipping of police and investigative units. We can't know that there's a problem of laboratories, of production of raw materials, of transit and trafficking unless law enforcement authorities are aware of it themselves and prepared to do something about it. We can help. Drug enforcement agencies and other agencies of the U.S. government participate directly in this effort. But ultimately, if we're going to succeed in knowing what's happening, it's going to require better training and better equipping of police investigative units in the host countries themselves. They have to be committed to it. We have to help them develop that commitment. We also have to supply the expertise and some of the background if it's necessary in order for those efforts to be achieved. And here we are legislatively constrained. Because legislative constraints were put in for good reason, they have to be looked at with care. When circumstances require, exceptions can be made as they were in El Salvador and have been done in other areas with respect to the narcotics process.

But that is step one. Step two, when you find there is a crime, how do you enforce putting a stop to the crime itself, detaining those who are responsible? I know that an earlier session addressed the role of the military in this. And indeed, we are dealing with a crisis of such broad proportions that the role of our military and that of other nations becomes essential, if there is to be enforcement against that ounce or several ounces fired from an automatic rifle of lead against those who would attempt to bring this about.

But enforcement has to take many forms. We've referred to this problem of buck passing, and indeed it is one. But let's not undervalue the impressive nature of this buck. In Bolivia, for example, to which we've heard some earlier reference, a new government comes into power, a government which indicates its intent to, for the first time, make illegal the production of coca anywhere in its national territory, except for a small amount for their traditional medicinal uses.

How do you go about enforcing that when you have over 300,000 people in your population who are solely dependent on it for their livelihood? We talk of programs like crop substitution. A hardy crop like coca is not going to substitute in terms of revenues. The best you can hope to do is to show people that they will not starve if they obey the law and leave that crop. How do you do that in the short run? Cash payments are what they were offered by the narco-traficantes. Can we match that?

I'll tell you it sticks in the craw of a lot of bureaucrats in Washington and a lot of concerned citizen taxpayers to talk about handing out piles of money to people not to produce coca. And yet if you're going to deal with the problem of enforcement and deal with the reality of a national government having to confront its own citizens, frequently in remote areas and frequently armed, you're going to have to offer them some alternative. It's got to be an alternative that is meaningful when compared to Jose going by and being able to put pesos in their hand before they ever plant the crop that might yield these kind of results. In El Salvador the problem was different. There you had an active insurgency going on, and it required direct military support in terms of training and assistance by the United States.

Step three in this process. Let's say we found out about the crime, we've captured the criminals. They then go into a criminal justice system, a criminal justice system which is suffering from a lack of funds and from the kind of threats to which we alluded before. Many of you are familiar with it. The justices of the peace trying to operate their offices on budgets of maybe ten dollars or so a month without typewriters, lacking skills and education themselves, lacking support staff or protection.

This can reach chronic proportions, as it does in many of the starving nations of the world. In the Caribbean, you just begin to see some of this deterioration taking place. AID did a study a couple of years ago. A fine criminal justice system in place left by some of the former powers in the area, but now beginning to crumble as books disappear from the library or grow out of date and national law libraries begin no

longer to be able to provide the support for attorneys. You see the same sort of deterioration of the justice of the peace system. And so the third element that has to be addressed is how you're going to go about strengthening the far reaches of the criminal justice system, the attorneys, the judges, who are responsible for making it work on a day to day basis.

Having taken that step, you then have the problem of evidence—of presenting convincing material that can be seen in courts. In many cases, the producing nations that we're talking about lack any sort of way of developing criminal tracing, being able to examine the materials that were involved, to determine that, in fact, an illegal controlled substance was involved. Fingerprinting, ballistics tests, all of those things require criminal laboratories. Nations that are lacking these techniques need help in developing them. They also need to be prepared to devote their own resources to this element of the process.

The next step is in many ways the toughest of all because it's where we require the real commitment of citizens. Amazingly, in my experience of over 25 years in the Foreign Service, mostly in areas in great conflict, developing nations, I've seen time and again that the people are always there. The courageous lawyers and prosecutors, individual citizens, who are willing to take jobs in government, willing to volunteer their own efforts frequently at tremendous costs to their own practices and their own time, in order to reform systems and make them work.

It's the nature of human beings that the good will always be there along with the bad and will react to it, and that's probably the greatest strength that we have in this battle overall. They have to be supported internationally: supported not just with money and with technical training, but equally important, with the kind of moral support that we have brought to so many of these conflicts. And their efforts have to be recognized, even when the efforts fail. We heard the example even within the United States government, that fighting this battle may not be career enhancing. It certainly isn't for those who are out on the front lines and risking their lives at it, and with very little in return.

The international community can recognize this, that it is to those people that falls the job of trying to reform their criminal laws, trying to reform the system in ways that makes it possible to put narco-traffickers behind bars, and not simply to find that the system that can be used and manipulated to their advantage. Having gotten this far in the process, and we've made a lot of steps to get this far, from enforcement through criminal systems that work to having the buildings and so on,

it then becomes necessary to answer that direct threat of the bullet.

And that means judicial protection units such as they have in Costa Rica, such as we tried to develop in El Salvador, so that the judges, the witnesses, those who participate in the process, can, in fact, exercise their integrity and bring criminals, whether they be in the narcotics field or in other areas, to justice without having to fear for their lives as they walk out the courtroom door.

If we've gotten this far, and if we've gotten the conviction, you then have the prison system. And we've seen in Colombia and elsewhere the problems that come up in trying to keep people in jail even when they have been convicted, and the lengths to which the narcotics business particularly with its bankroll, with its alliances, with the terrorists around the world, are prepared to go in order to break their cohorts out of prison.

And so the prison system needs to be strengthened, protected, enhanced, but also kept as something which is a legitimate instrument of national authority and not itself a part of a system of human rights abuses. Human rights abuses we approach usually from the point of view of what it means to our moral integrity as a country. But it also means something to the moral integrity of those countries which are affected, and countries which abuse human rights as a consistent pattern are not going to be able to enforce their laws against criminals in an effective and consistent manner.

If we can do all of those things, putting together the various steps that would go into an effective system, we must also recognize that above all else this must be an effort by the nations concerned, and not just an effort that's supported by the United States and the rest of the industrialized world. This has to be not just a concerted U.S. effort, it must be an international effort. If the U.N. can't play that role, then other organizations are going to have to play it. But we can't go it alone. We don't have the resources. We don't have all of the skills that are going to be necessary to make this work, nor do we have all of the solutions.

Europe and Asia are equally affected by this plague. And they, too, have to play their role in it. But together we can help to put these steps together for a criminal justice system. And so if we can have nations committed to the process, if we can take this step by step, then there are, indeed, legal initiatives that can work to begin to turn this program around. It is going to have to be coordinated.

Let me make one final pitch which is related to this in one way. When we talk about coordination, communications, my present job,

strikes me as being particularly important in the international control of narcotics. When we're dealing particularly in our north-south communication links, they're weak. They're particularly weak when it comes to transfer of data and large amounts of data.

Fiberoptic networks which are now going pretty much east to west around the world have not yet developed in north-south ways that make it possible to transmit pictures of terrorists, narcotic offenders, the massive amounts of data that are necessary in order to trace their movements, or to assist nations in integrating the effort between the rural areas where the crops are grown, where their laboratories and where the transit routes are, and the national capitals where they're trying to control this movement.

And so we are, in addition to the types of steps that I have proposed on a bilateral basis, also going to have to address, and we are trying to address this in association with our colleagues from AID and the multilateral institutions, what more we can do in order to develop better communications ties between north and south, between developed and developing nations so that the gap doesn't grow and the kind of circumstances that give rise to narcotics in the first place increase. I think everyone has probably said time and time again it won't be a process that's done overnight. That's obvious. It needs to be integrated. That's obvious.

It's multi-dimensional. That's obvious. We know a lot of the obvious things. The question is are we prepared to use the kinds of sophisticated strategies rather than simplified solutions that are necessary to bring this problem back under control? Thank you.

(Applause.)

DR. MOORE: Our final panelist is John O. McGinnis who is Deputy Assistant Attorney General in the Office of Legal Council. John McGinnis is a graduate of the Harvard College and Harvard Law School, where he was a member of the Harvard Law Review. He was also a M.A. degree in Philosophy and Theology from Balliol College, Oxford. He was a law clerk to Judge Kenneth Starr, and an associate at Sullivan and Cromwell in New York before joining the Justice Department in 1985.

I first met Mr. McGinnis at a conference that the ABA Standing Committee ran several years ago on the issue of treaty interpretation, and it is one of the clearest and most forceful presentations on the issue that I have heard to date. It was obvious that some of his training had been at Oxford, and indeed, it brought to my mind the famous comment that Lon Fuller made in his debate with H.L.A. Hart, which was

the one that was the English tradition: the clarity and the Oxford and the debating style and speaking was such that whether right or wrong, they were always clear. It seems to me that while John McGinnis from what I can tell was strongly right on that occasion, I have never had an occasion to disagree with him. He is also clearly right on those occasions.

So, John, we look forward to hearing from you.

MR. MCGINNIS: Thank you. Today I want to begin by disclaiming that what I am going to say is not in any way an official Department of Justice position. I've discussed it with no one at the department. It represents largely my own thoughts, and it is really a series of speculations, not a program of actions, but a prolegomenon to a program of actions.

My subject today will be essentially new legal initiatives to combat narcotics and narco-terrorism and the way that the United States can take these initiatives through shaping international law in what seems to me to promise to be a new age of international law. And before giving examples of such initiatives, it seems to me necessary to defend two theoretical propositions, which are both disputed by different groups.

First, that customary international law may be an effective weapon in any area, particularly in the war against drugs, and second, that the United States government is in a position to wield and shape it. As to the first issue, in the past decades, international law has correctly, in my view, been viewed as largely worse than ineffective. When the world was divided into two competing power blocks divided by fundamentally different ideologies, there was necessarily little space for fashioning rules of conduct.

Indeed, given that communist states while ostensibly expressing adherence to norms of international law systematically violated them, international law came to be seen, correctly in my view, as a one set of constraints on the West, a set of constraints which actually hampered its struggle against totalitarianism. Moreover, because of these divisions between East and West, there was little opportunity for effective enforcement even of shared norms. For instance, the U.N. acts as an enforcer only through its security council where the USSR had a right to a resounding "*nyet*." Even most regional blocs were themselves driven by the split between communists and the west.

With the demise of the Eastern bloc, it is perhaps not too much to say, however, that an opportunity for a new age of international law may be upon us. There no longer seem to be the irreconcilable differ-

ences between the two huge blocs that create inseparable obstacles to construction of orders and institutions to combat international problems. Moreover, as we have witnessed recently, there is dramatically an increased willingness on the part of the U.N. to play a useful enforcement role as well as an increase in the authority of regional associations.

Thus, I think we should look towards international law generally as a source of area for initiatives, and in particular, it seems to me an area of initiatives in the war against drugs and narco-terrorism where there is such a community of interest between East and West. Indeed, I think there may be no greater agreement on any proposition in the East and West today than that opiate is in danger of becoming the religion of the masses unless action is taken, dramatic action, to stop the growth in drug trade and narco-terrorism. In short, I think while we've long been used to watching international law being used as a shield to protect wrongdoing, we should think of it now as a sword to attack wrongdoers.

The second reason for turning to international law is that the executive branch—the branch which the framers created to act with, in the words of John Jay, “dispatch,” may take initiatives without, in many instances, waiting for authorization from Congress. As *Curtis-Wright* reminds us, “in the vast external realm of foreign affairs, the President alone has the power to speak or listen as a representative of the nation.” This vast external realm certainly includes international law, and thus, the President, through his agents in the executive branch, is the chief exponent of the United States’ view of international law before the world.

Moreover, the President’s exposition is not static but dynamic, *i.e.*, the President and his agents do not simply discover and follow norms of international law, but in large measure participate in their creation. The creative aspect of his role stems from the nature of international law itself. Customary international law is not a rigid canon or rules, but an evolving set of principles founded on common practices and understanding of many nations. It is understood that this evolution can occur by a state reshaping international law and creating rules that take account of new realities or even occasionally by departing from prevailing customary international law principles. Thus, a state may seek to promote a new understanding of an old rule or even a new rule of international custom or practice.

Thus, in essence, we should think of the President acting through the executive branch perhaps as a judge in a new golden age of the

common law of international norms with the power to create as well as to discover. Indeed, given the importance of the United States in shaping international law, the importance we have from being the most powerful country in the world, it is not too much to see the President as the Master of the rolls in international law.

The rest of this talk will be devoted to a brief discussion of the possible examples of the creativity that may be used in the struggle against drugs and narco-terrorism. I think there are already public examples of it. It may not have been noticed widely, however, but one of the justifications formerly given in both presidential statements and in legal briefs for the United States intervention in Panama was to restore a government that would be able to carry out its obligations under the Single Convention on Narcotics.

There is an obligation on countries to prevent their territories from being used as a haven for smuggling drugs into the United States. To be sure, this was not the only or the primary justification for United States intervention in Panama, but it serves as a precedent, at least in an extreme case, and a warning that willful failure to abide by the terms of the convention or other international norms can justify a proportionate response by the United States. In this regard, the doctrine of self-defense should be considered as also authorizing proportionate responses to territories where the government is failing in its obligation to prevent drugs from flooding into neighborhood countries.

This result, I think, can be derived directly from international law. The duty to use diligence in preventing attacks on neighboring nations from a country has been clearly established in international arbitral decisions for many years. As the arbiter recently stated in the *Island of Palmas* case:

territorial sovereignty involves the exclusive right to display the activities of a state. This right has a corollary duty, the obligation to protect within its territory the rights of other states and in particular their right to integrity and inviolability in peace and war together with the rights with which each state may claim for its nationals and foreign territories.

Now, prevention of the importation of drugs, which may cause much greater social damage than isolated terrorist attacks seems, should be evaluated under the same principle. As Judge Gee said in rejecting a claim that a drug pusher could not be punished more harshly than a murderer,

except in rare cases the murderer's red hand falls on one victim only, however grim the blow. But the foul hand of the drug dealer blights life after life, and like the vampire of the fable creates others in its owner's evil image, others who create others still, across our land and down our generations, sparing not even the unborn.

I think Judge Gee's remarks pungently show that a failure to curb drug trafficking in a state can be in many ways as damaging as failure to control terrorist attacks and have to be evaluated under the principles of self-defense and proportionality. Of course, I want to emphasize here that in considering proportionality and self-defense, I am not suggesting that the United States will be justified and certainly not prudent in declaring war against countries that do not control their drug trafficking problems. But once, however, it is recognized that self-defense and principles of proportionality are triggered in looking at drug trafficking and narco-terrorism, I think it becomes clear that sovereignty can be seen in a different perspective, and that perhaps the extraordinary efforts of the United States or the sort of multinational institutions that we may need to attack this program can be understood in a new perspective.

If nations that cannot control drug exportation are seen as having complete sovereign rights, which cannot be infringed upon at all, it may be much harder to create these multilateral institutions that may lessen the autonomy of such nations in order to control this problem. However, I think we see that in a new perspective when we understand that really drug trafficking can be understood as a threat to other nations to invoke the rights to self-defense, whether individual or collective, and thus create the foundation for the restructuring of international organizations to delimit sovereignty in a way that will perhaps effectively combat this problem.

Before discussing what sort of organizations they may be, I want to give a practical example of something short of war in which the principle of self-defense, I think, is important. For instance, there are instances in which Country A may consider assistance to another country's air interdiction program against drug trafficking. And in so doing, Country A must consider whether Country B's interdiction program complies with the relevant international agreements, such as the Chicago Convention on International Civil Aviation.

One of the salient principles of this convention is that its procedures entail warning and request to land and does not authorize the downing of civil aircraft. Indeed, you may recall this convention was at

issue in the KAL 007 dispute. And I think these principles are, of course, very sound. But the Chicago Convention on International Civil Aviation does not in any way trump the principles of self-defense, and when a country, Columbia for instance, is faced with essentially an insurrection from drug traffickers which have, we've heard on this panel, so much money that they essentially create an imperio in the country, I think there may well be justification for treating these not as civil aircraft but military aircraft or seeing drug traffickers as essentially an equivalent to a Barbary pirate state, and so essentially being able to treat these as military objectives, and so not having the Convention of International Civil Aviation apply at all. That's important because it then frees up a Country A, a country like the United States, to give aid to these countries even if they are undertaking a more vigorous and military response to such activities.

Finally, I'd like to just end with my point about legal institutions. Once it is seen that sovereignty has to be bound around by notions of self-defense against narcotics and narco-terrorism, greater authority for international organizations and institutions can be considered.

For instance, an international drug police force seems to me a real possibility under an international organization that would be at least the equivalent in power and size something like the Food and Agriculture Organization in which the UN nations would bring together and have access to a variety of funds. The organization would have international police that would go into various countries. I think this could have several advantages because it would not make the United States, which particularly in Latin America is not viewed in a favorable light, the central focus of enforcement. This would be seen as an international effort. The response to those who complained that this international police force infringed on their sovereignty would be the response that, yes, it does take away some sovereignty to some respect, but that only proportionately to the damage this is doing to other countries.

So I think this is an area in which we have to consider quite carefully the growth of new international organizations to take advantage of the growth of the new international enforcement norms that should be seen as arising out of the right of countries to not only individual but to collective self-defense. In other words, the collective self-defense under international law in the drug area, in the narco-terrorism area, should be reflected in a new structure of international organizations to implement that defense. Thank you.

(Applause.)

DR. MOORE: Thank you, John. Let me summarize a few of the

issues presented in this panel before opening the floor for questions or comments. One was a question as to whether we have in the United States an adequate mechanism to coordinate between the domestic and the international side and to coordinate all of the international components. I don't know the answer to that, but I can certainly say as one who chaired in the past an NSC task force that did exactly that for Law of the Sea, and Myron Nordquist who was the office director of that is here, currently the Deputy General Counsel of the Air Force, as he well knows also, that was an indispensable mechanism for carrying out United States Law of the Sea policy. Had we not had something like that, to do a good job we would have had to have invented it. So I don't know the answer to that, but surely that's one set of issues that ought to be open for discussion. Ambassador Jordan had raised that, I think he presented the issue very, very clearly.

Secondly, we've had a great deal of discussion particularly on the demand side in looking at the importance of education. One always looks at a complex system in terms of cost-benefit effectiveness, and my own instinct is, and this was certainly a recommendation of one panelist, that education may be one of the most cost-benefit effective things that we can do in this overall setting. To what extent do we have in place a program of education that every single American child in school will at some point encounter a very high level, high grade program explaining what the costs are to society, what the costs are to them, what personal use would mean, what the legal dimensions and what the moral dimensions of these kinds of decisions are. Again, I don't know the answer, but are these things that we ought to be looking at.

The third set of issues that have been raised concern public education. To what extent have we adequately informed the American people of the overall cost of this problem, of the continuing trends, of whether those trends are getting better or worse, and whether we are adding to the Just Say No campaigns information that enables people to really understand why at a personal level and at a community level decisions to use drugs are extremely harmful and damaging.

Fourth, we've had a series of suggestions that we ought to look much more carefully at a fuller use of United States intelligence assets and capabilities that are already in place and that are used in the national security side in general. Again, I don't know the answer to what extent those assets are currently being used. There may well be a series of policy issues that need to be carefully looked at, but surely if they are not being fully used, this an area that we ought to, at least, be

raising questions with respect to the use of such assets.

Fifth, we've had a whole series of suggestions made with respect to creating private incentives to deal with some of this. Could we, for example, involve the very helpful involvement one already sees at a community level? Could we enhance it by a much more effective program of rewards? Would that turn out to be quite cost effective, for example, to really create very substantial incentives in the private sector to turn in drug dealers and to turn in drug activities? With respect to the use of the law on that, all of us as lawyers have seen the use of treble damages in antitrust cases. Should we have a network of civil suits based on treble damages against drug dealers?

Should we be able to create something that operates across international boundaries that enables one to go after assets even internationally with respect to the involvement of drug dealers and any damage that may be done? Maybe there are other proposals, but to what extent might new civil litigation possibilities that would mobilize the private bar be something that would be possible here?

Sixth, there's been very strong arguments for assistance from a number of speakers for foreign assistance programs targeted on the judiciary and the rule of law, particularly strengthening the judiciary branch that is the one out on the front line and told to wear tennis shoes literally to run away, as we heard in terms of the degree of protection that can be offered in some of the front line countries on this. Is this an area that would be particularly fruitful for a country that supports the rule of law to have a greater rule of law engagement effort, and to support enhancement of the judiciary and other assistance in these countries.

To the extent that there is involvement of a nation such as Cuba, questions have been raised as to the extent to which the United States has sent protest notes, has lodged claims with respect to monetary damages under traditional international law, whether or not the claims are paid, and to publicize those claims and those activities so that the international community would know what they were. Issues have been raised in discussions with respect to synergy between the use of automatic weapons and drug dealing. Are we ending up with a series of these gangs all over the United States with access to automatic weapons that are beholden to a variety of foreign groups? To what extent does that have serious implications for U.S. national security over the years?

Is there right now some kind of particularized and very serious penalty for a combination of automatic weapons or semi-automatic

weapons and drug dealing? Nine points have been made about placing emphasis on training of police. And here Ken Bleakley has indicated, I think correctly from what I have seen, that there are a variety of legislative restraints that grew up in a different era, and it may well be time to, indeed, may well be past time to reassess those constraints, as yet another set of issues.

Tenth, we've had questions raised as to whether there are any legal constraints here that may be in place that would prohibit the use of highly sophisticated infrared radar or other military technologies, military intelligence or surveillance technologies that may be in existence now that might be brought to bear on the drug war.

One point might be raised with respect to ABA involvement. Given the potential for creation of new legal initiatives and use of the law creatively, should the ABA set up a task force of governmental and non-governmental legal experts to try to come up with new ways of placing legal constraints in the road of drug dealers and those involved in these operations, both at the international and at the national level?

To what extent could such a task force identify areas, for example, of current legal constraints that might be modified appropriately that are otherwise standing in the way of problems? John McGinnis has raised in a very provocative and thoughtful way simply the extension of the concept of self-defense to settings of intense threat from drug engagement activities in the territory of nations that are not fulfilling their obligations to make every effort to stop those activities. He has raised the issue as to whether we ought not to use the collective defense analogy, indeed the individual self-defense analogy in this case.

I might add that there is a rich body of literature on this applying it to the economic area, growing out of the first and second oil embargoes. This is not something that ought to be regarded as entirely new interpretation of the charter. Professor McDougal and others, for example, for many years have argued exactly this, that the level of intense threat, if it rises to a level that's sufficiently great, the attack does not necessarily have to be armed aggression as such. So that's a very interesting suggestion that John has made. I think it ought to be taken seriously in triggering an interesting discussion.

John made a suggestion for an international drug police force. Finally, we heard a superb presentation from Irving Tragen, the Inter-American Drug Abuse Control Commission, and one asked, given the importance of the OAS in all of this, whether the United States is doing enough to support the OAS; whether the OAS is doing enough in terms of what might be done and in a setting in which we have a very

strong national interest in supporting an organization that has been one of the most important historically of all regional organizations, the earliest one to be formed, and of great historical interest to the United States and importance to it over the years. Is this something we ought to do to continue to work cooperatively and to enhance that relationship in every way possible?

Those are a few of the things, it seems to me, that have been discussed so far as an agenda, and I will open it up for this point for question and answer. Yes, Sir?

MR. ANDERSON: John Anderson, a former member of Congress, now with the Nova Law Center. I was wondering, in connection with the suggestion that Mr. McGinnis just made, about the possibility of an international police force under the aegis of the U.N. Professor Jordan was a little bit dubious about inviting a great deal of hope and confidence in the ability of the international body to deal with that problem. It occurred to me, and particularly in line with the summary just given us, a very excellent summary by Professor Moore, about whether or not we are adequately deploying intelligence assets that are already in place, would it be possible at a time when we are very much thinking about a reconfiguration of the role of NATO to use perhaps NATO in some imaginative way? Even though it's the Andean countries that are the primary source of cocaine we do have the Sicilian connection. We have the French connection through Marseilles. We have, I suppose, the Dutch connection with the port of Rotterdam, all members of NATO. I wondered whether or not some thought could be given to the possibility of finding some role, particularly in the deployment of intelligence assets, of some new definition of a role for NATO in this area?

DR. MOORE: Who would like to answer that?

MR. MCGINNIS: Obviously, I don't know a great deal about NATO. But I think the resources that NATO has to use have to be turned into problems that are more pressing than the threat of aggression from the Soviet Union, which has disappeared. I think that this is a useful suggestion. I think, however, what is more crucial is that any initiatives involve the Andean countries in any international approach to the problem because, again, my concern is that in the past, it has been seen as simply gringos, I think, versus the Andean countries. And I'm not sure that simply greater public participation of NATO will help combat that perception.

AMBASSADOR JORDAN: Let me just make a brief comment. The problem with multilateral activity is that multilateral activity re-

quires leadership, and if the United States doesn't know what it's precisely out to do or to accomplish, it's very hard to get the multilateral organization to follow. We've had a particularly, I suppose, encouraging example for a lot of people in terms of the changing international environment, but it took an enormous amount of clear direction as to what the United States wanted to do in terms of the Desert Shield, the whole Saudi Arabia, Iraq thing. And you could mobilize people on this.

What I'm saying is that as a precondition for using multilateral and all of the rest, or hoping for them to pick up the slack, is that we know what we're doing ourselves. We've got that worked out. With respect, and in that context, the U.N. is far better than NATO is for Latin America, and the OAS, in my judgment, if it could be revitalized. It would be hard to use it to some degree, say, in Peru and Bolivia and perhaps less so for Colombia. But you would certainly not want to involve NATO in it. If you didn't use the OAS or U.N., you wouldn't have a multilateral arm that I think would—

MR. ANDERSON: Well, I thought I made it clear that I was saying that with respect to the Andean countries, I realized that this would not be the appropriate organization. We do have a hard drug problem involving heroin and other drugs that certainly are coming in from other parts of the world, through NATO countries.

DR. MOORE: We have time for one short question. At this point, I'm going to call on Irving Tragen of the OAS.

MR. TRAGEN: Thank you, Dr. Moore. I would like to make a comment at this point as well as a question. And it has to do with some of the recent comments about multilateralization. I think the most difficult problem that we face is not clearly identifying what it is that countries want to do. As the executive secretary of an inter-American organization, we've spent what appears to be an inordinate amount of time getting the issues framed. It's terribly important we get the issues framed. And I can take it almost item by item.

As Mr. Bleakley knows, in the area of law enforcement, one of the most difficult issues is defining what kind of law enforcement training you're talking about. What kind of organizations can be involved? Who does the training? What kind of training, and then once you've done that, how do you deal with issues like corruption and professionalization?

Now, unless you phrase the issues and define them precisely, we end up doing a series of repetitive efforts without being able to evaluate what we're doing or where we're going. I think in the course of our discussions over these two days, we dealt with a large number of issues,

extradition being a very important one. And extradition is in the eyes of many Latin American countries a cop-out because it isn't facing up to the legitimate questions of the strengthening and consolidation of their own law enforcement processes. In my first assignment in Latin America almost forty years ago, the first judge I dealt with was a fifth year law student who was assigned to what we would call a municipal court.

His one year of service, public service, before he received his law degree, was to be a judge. I don't want to go further than that. El Salvador has the same system. We're talking about strengthening legal systems. We have to strengthen them in terms that are meaningful to Latin Americans, not to us.

What I'd like to suggest is that some marvelous ideas have emerged, and I think part of what we need to do now is to engage the Andean countries in a dialogue. I think what's far better than the ABA, the bar associations of Latin America or the bar associations of the U.S., is that we have a good instrument we have in the inter-American bar, which will be meeting here in a couple of weeks. Maybe we could begin to focus some longer term questions through dialogue between these various institutions which can help us then to more precisely define how you apply these various instruments that you've been discussing. Thank you.

DR. MOORE: Thank you, Dr. Tragen. Those are, I think, certainly very pertinent and important comments, and I hope they will be taken to heart. We are now out of time, but let me just add two brief points. One is a point that Joe Douglass had made earlier that this latest discussion has reminded me of. I think it was an excellent suggestion that we try to have some effort, hopefully governmental. But one would also imagine even the private sector being useful in this, to go through the records of the fallen regimes in Eastern Europe and to put together, in fact, the trail and the story of the massive governmental involvement, because I think that is something that is very important for the public record to know as we move beyond governmental involvement.

So, Joe, I personally think that's an excellent idea. Here's an area that where our government can work with NATO. In fact, the German government is going to be in an excellent position to have all the access to the files of the East German Intelligence Service. It seems to me that this is an area that for the health of that new German union and for the health of all the new Eastern European governments, it would be useful for them to come clean, and to get this on the public record.

It would also help in such things as Cuban involvement, for example. So I think that's an excellent idea.

(Applause.)

(Whereupon, at 12:35 p.m., the meeting recessed)

III. GENERAL CONFERENCE SESSION/AUDIENCE DISCUSSION

DR. MOORE: We are trying at this conference something a little different, which is an opportunity for audience discussion and participation that would be a little more focused; not simply a question and answer format, but an opportunity for a real discussion, a real generation of ideas, an opportunity to say here's an idea, what do we do about it. Have three people shoot it down if it's got weak parts, and on the other hand, if things are really good, get them picked up and widely disseminated around the government or in different areas where people have been participating. So this is really in your hands. I'm simply here to field the questions and to try to encourage the interaction among you.

DR. OLIVER: I'm Philip Oliver with the University of Arkansas at Little Rock Law School. I was interested, Professor Moore, in your listing of fourteen things. I think that the one that had at least been touched on that I think is worthy of greater consideration is that of legalization. I have thought for a great number of years that as desirable as it would be we were not going to win the war on drugs, and nothing that I've heard in the last couple of days has made me more hopeful that we will.

The war is an extremely expensive, costly war, costly for our institutions, costly for friendly governments, costly in resources. Certainly there seems to be little hope of winning greatly increased resource allocation. I think that the realities of the American political situation are that we're in a time of shrinking resource allocations from government and not increasing allocations. So I think we're ultimately going to lose the war anyway, and the costs of continuing it are quite high. I am not persuaded that legalization is the best course. Particularly, I'm disturbed about all of the emphasis on the approach with the Andean countries, when just yesterday I learned of developments with respect to developing synthetic drugs in this country, which seem to me make it largely irrelevant as to whether we can block production in foreign countries if people can go into a laboratory here and produce drugs.

DR. MOORE: Could I just clarify before you leave the microphone exactly what you are proposing, because legalization or

decriminalization can come in many different proposals. We heard one proposal the first day of decriminalizing marijuana, and a sharp rebuttal by a number from the audience on that. Are you proposing decriminalization solely of marijuana or of all substance abuse including cocaine, crack, heroin, PCP, all hard drugs, et cetera?

DR. OLIVER: Well, I do not have a fully developed comprehensive plan, but my idea would be full decriminalization. It's been my thinking that the most addictive drugs are the ones that most need to be decriminalized because they are perhaps going to be the most resistant to other kinds of restraints. I would envision a situation in which we would perhaps consider some sort of registration of drug addicts, which I think, while taking the profit element out, would also perhaps make it somewhat unlikely that people would find it worthwhile to go down and register as addicts in order to try out a new drug. We could then move toward a system of providing drugs at cost, which would leave, if indeed it is the highest and best use of certain lands, the Andean region's production of coca. I think this is not at all inconsistent with what I think I've been hearing: that one of the major things we need to do in fighting drugs anyway, is education of the American public. We could simply say we're going to deal with this as basically an American demand problem. And we're going to deal with this by trying to influence people into thinking that it's not a very good idea to take drugs. But, yes, it would be what I would envision across the board.

DR. MOORE: Let's open the floor for discussion at this point. Anyone else care to discuss the issue or raise it? Obviously, this issue has been joined in the public debate before by a number of people including Milton Friedman and George Shultz. We have one comment from David Martin. Yes, David?

MR. MARTIN: This, of course as you have pointed out, is not a new proposal. Bill Buckley, who is a very good friend, has been pushing this idea for a long time. There is a body of scientific literature which has direct bearing on this. In 1972, they had what they called, I think, the free access experiment. They took one body of students without any separate body for comparison. And they gave them free access to marijuana.

In short, you weren't persecuted. You were not taking forbidden fruit when you helped yourself to marijuana. Students who had used marijuana once a week, very occasionally, or twice a week, went up to one cigarette a day. Students who had used one cigarette a day went up to three or four cigarettes a day, all in the period of one month's time. Now, it's deducible from this, if you make drugs more available, more

easily available, they're going to be used more. And you have to then ask yourself what is going to be the effect of this greatly increased use of the quality of human life and the quality of society?

And there is absolutely no question that human beings are reduced to far less than their potential by abuse of drugs, and that the increase in drug use would have a disastrous effect on the quality of society as a whole.

DR. MOORE: Thank you, David. Yes, the gentleman from the OAS, Mr. Tragen.

MR. TRAGEN: I think we have a very difficult problem here. We have a difficult problem because I don't think we have yet in this country faced up to what the drug problem is, particularly in our cities. Now we have some experiences in the world with legalization. Britain, for example, ran through the experience of allowing those who were addicted to register with the health service and to receive heroin on demand. That has not, in any way, eliminated the black market in heroin in Britain.

We need a lot more analysis of what did happen in Britain. The Dutch, as we know, basically allowed the open use of marijuana, and you can get everything in coffee houses in Amsterdam from cakes made with marijuana to marijuana tea to the joints themselves. That was on the supposition that if you had marijuana, you would not go into the harder drugs. Anyone who has been in Europe recently knows that in cities like Arnhem which have a policy of acceptance of use, not legalization, you have rioting in the cities because the Germans and the French are coming up to buy their drugs and, they not only have brought with them the problem of drugs, but also all sorts of other criminal activity, including prostitution.

You have city councils all over the Netherlands facing revolt by citizens because of it. What I do think we need in all honesty is a much harder look at what we mean by legalization. As Congressman Rangel asked, are we going to legalize it for kids under the age of sixteen? Are we going to do it for kids under eighteen? Who's going to distribute it? Are we going to let Coca-Cola have a patent, or are we going to set up, as in the state of Virginia, state agencies where you're going to sell it?

What are the conditions under which you're going to sell it? What degree of purity? What are the standards you're going to apply? I think our major problem, and I've done a lot of reading of the articles by Mr. Friedman and Ethan Nadelman and so many very eloquent advocates who are as concerned as we are about the disorder in the streets, but they really haven't come to grips with either what the expe-

rience has been abroad or what the implications of legalization are.

Now we can look at this in two or three different ways. If we want to really make and have an impact on the use of drugs, maybe the answer isn't decriminalization. Maybe the answer is in the kind of penalties we impose for first use or second use or third use or the penalties and sanctions we use for the dealers. We haven't really thought much of this out.

That's one of the areas where as an inter-American community, shortly we're going to have to sit down and begin to think it through, because obviously if it is true that we have 25 million of our citizens, ten percent of our population, who are now regular drug users, whether they're marijuana or cocaine or heroin, we haven't got enough jails. And I wonder if the best use of our money is to build more jails when our real answer, our real challenge, is how do we rehabilitate and how do we eliminate the attraction of drugs? I think we made a lot of mistakes in social programs in the past. Maybe we've got to think through what we do in the inner city. Maybe we've got to go to some of the things Jack Kemp has talked about. Maybe we've got to go to some of the things that members of the Congress are talking about in reestablishing inner city programs. But I wonder if the answer is as easy as legalization because I don't think any of the experiences anywhere in the world indicate that legalization has eliminated the problem.

DR. MOORE: Thank you, Mr. Tragen, for as always an excellent statement. Others on this? Yes, yes, sir. And then if you would like an opportunity at rebuttal or further discussion, you're most welcome.

MR. MIKUS: I am Joseph A. Mikus, a professor emeritus, member of the American Society of International Law. I'd like to make some comments on this conference. Conference on narco-terrorism certainly is a highly specialized conference and deals only with one aspect of the public interest in the world. When we spoke about consumption and certain people tried to put the whole responsibility for the development of this traffic on our consumption in the United States. I believe this is a very false approach because this is not a private, I would say, law transaction like buying something in a drug store. This is a public interest issue.

And, of course, it's not the only one. There are many other issues. I found in the book published just now by Professor Moore, National Security Law, an item called "global anarchy". We are living in a world really dominated by global anarchy. Narco-terrorism is only one aspect. Other aspects are arms, ecology, hunger, drought, refugees and so on, and wars. We are even now in the middle of an evolution which

may lead to war. So I believe these all are public interests and we should pay attention to the whole problem as such.

DR. MOORE: Could I just make an intervention for a moment? Are you suggesting that we can't take these to some extent one at a time and have to solve all the world's problems at one conference, or would it be enough to solve narco-terrorism in one conference?

MR. MIKUS: No, it means we have to come to a kind of global approach to the problem because this is only one section of it. I believe that treaties are simply agreements among private parties. There is no enforcement for it. There is no, for example, judicial enforcement of treaties. If somebody is not satisfied with the treaty, he would simply denounce it. And there is no way of enforcing the treaty. The International Court of Justice is practically not international. It's not a court. It's an opportunity for arbitration, and we know all that. The decision of the court depends on the consent of the parties, and certainly this institution doesn't have very much to do with the justice in the world. So I believe that we have to organize probably another global conference about these aspects.

I believe that the International Court of Justice and the United Nations, as voluntary organizations, don't really have great meaning. These are social conferences, permanent conferences. As lawyers, we know that in our country, which has a constitution which controls, for example, every state and every citizen, that states are not any more voluntary members of this country. If we speak about law, law is a pyramid, not an institution having simply a kind of horizontal dimension.

DR. MOORE: Can I interrupt a moment?

MR. MIKUS: Law is something with vertical dimensions.

DR. MOORE: And perhaps unfairly. Tell me if I'm being thoroughly unfair. I frequently am as a chairman. But the problem is I would like to try to—and indeed, I've been accused of being able to cut off speakers like Mr. Justice Holmes in the middle of the word "if," but as happened here, I really would like to focus precisely on the drug issue. I think your point is a very good one about the importance of a whole variety of problems. And I think you would find the audience very sympathetic to that.

But I've got several others that would like to get in, and we haven't really perhaps concluded the discussion on the decriminalization. You go ahead if you want to just wind up.

MR. MIKUS: I would like simply to bring in a new idea. Now we are really in the middle of a kind of a development which may lead to a

war in the Persian Gulf. I have published a book about world public order. There is a reality in this world, and that's the existence of the five nuclear powers. These powers really may become a kind of a world authority. I believe that as you know there is a dispute between Mr. Buchanan and Mr. Safire about that war, I believe that we just cannot be a policeman of the whole world. But these five nuclear powers which have absolute power, they should somehow come together, close a kind of closed circle and decide things by majority.

For example, in our Supreme Court some decisions are made by five members against four. So something like that should be used in, as I say, a closed circle of this pentarchy of five nuclear powers. I would like to propose this for discussion now.

DR. MOORE: Thank you very much. Let me add is there anyone else on the legalization issue before we close that off? Yes, go ahead. Did you want another chance at this?

DR. OLIVER: I would like, yes.

DR. MOORE: All right. Go ahead.

DR. OLIVER: I would just like to make clear that I am not advocating legalization in any sense. Assuredly, these drugs are terribly harmful, and I think that it is probable that we would have some degree of increase.

I think that we cannot gauge at all because we are sailing in completely uncharted waters. The world has unprecedented problems. In particular, the United States has unprecedented problems in these areas, but the comparison is not whether we want a drug-free world or a world with legal drugs. The question is between the comparison with the actual world and perhaps a world that we maybe can achieve through an outpouring of enormous resources, a continued destabilization of friendly governments and so forth, that possibly we can obtain a significant decrease, but very likely we will sustain all those costs without getting a significant decrease.

So it is between two highly imperfect worlds, and as long as we are dealing with a situation in which ten percent of our population, and probably something greater than ten percent of Peru's population, is engaging in this sort of activity, I think that it's going to be a rather intractable problem as this conference has demonstrated.

I don't think that it is necessary, at least to have a realistic debate, that all the details of legalization be worked out. Certainly not all the details of maintaining the present system have been worked out in advance, and I certainly do not think that this would be a panacea, but I do think that it would be quite an improvement.

DR. MOORE: Before we shift, anyone else on this subject? If not, let me, again, perhaps unfairly, but as the only one up here at this point, just add one additional word on this. We had one other person who wrote to me before this conference saying that they felt there was not an adequate opportunity to debate this issue, and they didn't see any advocate of legalization on the program. So I think it is certainly a fair set of issues given the range of people that have raised it. The last thing we want to do with our most serious problem is to cut off serious discussion about the options for dealing with it, and that is a serious option for dealing with it. And it seems to me it needs to be looked at very, very carefully.

My own view of it, as a non-expert in this area, and as a person who is normally very attracted to free market solutions, is unalterably opposed to legalization. I have personally not seen any legalization proposal that deals with, I think, the two major problems that seem to me to be left. One is, from what I can tell of legalization, it is highly likely that consumption would go up in a legalization setting. If we take as the starting point your concession that these are highly dangerous, and we live in a world that now understands that as opposed to the 1960s flower assumptions about the whole world and the taking of drugs, then it seems to me that is a very, very damning admission to any legalization program. I have two little daughters and I suppose I'm representative of all fathers in that respect. I do not want my daughters to be living in a world in which they get drawn into that, and my own view is if we had a setting of legalization, their chances of that would go up. I don't know by how much, but I suspect by significant amount. My second point is that I have never seen a program of legalization which would eliminate law enforcement problems and any law enforcement role in the process.

It seems to me that the points made by Mr. Tragen on behalf of his committee, and the OAS has looked at this very carefully, and David Martin and others, are really absolutely correct. So I'm inclined to think that the cost of that solution does, in fact, outweigh the things you get on the other side. Now having said that, let me say that one of my closest associates, Robert F. Turner, who is now sitting with me on the table up here may have entirely different views on this issue. I've talked to him privately from time to time on it. I don't know what his own views are, but I can tell you where I stand which is unalterably opposed to legalization.

And I guess the last thing that concerns me is that I think it's a completely false solution to the problem. One of the reasons I didn't

feature it at this conference is because I am personally concerned that the debate and the discussion about legalization is leading us to spend our energy on solutions that I suspect will not be helpful in dealing with something that is going to be very imperfect, that's going to be a perfectly miserable social fight against this thing for many, many years to come. But those are just very personal views. Robert F. Turner does want to express his personal views also.

DR. TURNER: I didn't until you said that. Can I join you?

DR. MOORE: Yes, please do, Bob.

DR. TURNER: Some of you know, last Sunday I came out in favor in the eyes of many to assassinating Saddam Hussein so why shouldn't I come out for legalizing drugs today just to be consistent. I don't favor legalizing drugs, and indeed I don't favor assassinating Saddam Hussein. What I do favor in both cases is not ruling out options without thinking them through.

One of the pluses to the legalization approach is that it may solve one of the biggest problems we have today; that is, crime caused by people who are trying to raise the money it takes to buy drugs at a price far above their cost because it's illegal. If legalization could get organized crime and disorganized crime out of the business of trying to hook kids on drugs for a profit, that would be a plus.

Another concern of mine is one I raised at lunch, and that is, I don't see us making much of a dent in this problem by attacking the supply because it's so easy to smuggle. The profits are so great that if we paved over all of Latin America, the Swiss would start doing it, and if we shot the Swiss, the Swedes would do it, and pretty soon there would be somebody down in the basement of the White House doing it because there is so much money in it. We have to deal with the demand.

I don't think we're doing enough to deal with demand, and I think one of the reasons is because the political forces that have responsibility for these decisions don't want to take the heat of angering the American people. There are too many Americans that want to have drugs, and there are too many other Americans that don't want to have to urinate in a bottle, if you'll pardon the crassness of that. But it seems to me that if we were to legalize, one of the things that we might accompany it with is the libertarian argument. I come at this as a libertarian by philosophy, not as an extreme, but as a moderate libertarian, of limited government, maximum individual freedom of choice within certain constraints.

It seems to me that one of the problems with normal libertarian

approach is that somebody has got to pay the cost of treating and supporting all these people. In a libertarian society, you suffer the consequences of your own wrongs. If you refuse to work, you go hungry unless somebody else wants to support you. But one of the things I've been thinking about at this conference is that if we were to take that approach and to combine it with an approach that says, however, in order to receive any government benefit which includes a job, which includes welfare benefits, which includes public housing and so forth, you have to take a urinalysis and if you flunk that, or some other better less intrusive test, you are ineligible unless you are engaged in a rehabilitation program.

So that at least the people that were on drugs would not be forcing the rest of us to support them, and then, of course, if engaged in drugs while in a crime, you would not make that a defense to the crime. The act of voluntarily taking drugs would be interpreted hopefully as wrongful conduct and not as—you know, you can't—it's like you're killing your parents and throwing yourself on the mercy of the court as an orphan at some point. And the other side of it would be a tremendous educational program aimed at educating school children, voters, everybody, of the horrible consequences of drugs. But even having said that, I'm not at this point prepared to come out in favor of legalization.

John and I have some fun debates among ourselves and on the CB radio to and from Charlottesville, and I have on occasion taken that as an advocate. But I continue to think the best approach is not that, but the best approach, if it's going to work, has to deal with the demand side.

Indeed, one more last point. I teach international law, and I like to get my students to think, and I was teaching a class on state responsibility right after a class on the use of force. And I said, let me give you a hypothetical: what if we learned that the Soviet government was paying billions of dollars to American citizens to kill our government officials and violate our laws, would that create state responsibility? Well, of course, it would. And would that allow us to use force in self-defense? Well, most of them thought it would. And I said, well, let's change it. What if a group of Soviet citizens with the knowledge of their government were doing the same thing, and their government was not acting effectively to stop it, would that create state responsibility? Everybody, virtually everybody agreed. Could we use force? Well, they were sort of split. They wanted to look at the book again.

And then I said, okay, now reverse it. Now we're a bunch of Colombians, and we find that private American citizens are offering

billions of dollars in bribes to our citizens to kill our judges, kill our president, violate our laws, so they can have this narcotic they want. Is that a violation of international behavior? Does it create state responsibility, and their eyes got real big, and they said wait a minute. We know the Colombians are the bad guys in this, but maybe this is more complex than it looks. I think we have a duty to the rest of the world, and I think one of the problems right now is our citizens are bribing the world to violate their laws and give us drugs.

There are a lot of politicians that want to portray that we have a problem here, that these horrible Colombians are up here and forcing our people to use drugs. That's now that's happening. It may be convenient to get reelected as a politician, but our people are begging them to give them those drugs, and are offering them billions of dollars in bribes. We're the problem. Sure, there are evil people down south making a buck on this, but until we face the fact that the United States is the primary market on this and start doing something to get control of that, I don't think we're going to win this thing. I think we're going to spend billions of dollars.

We have got drug people out there that have an incentive to hook children on drugs, and I've not heard all the conference. I've been in and out trying to defend my unfortunate assassination remarks, and let me stress I don't believe in assassination. I believe that a lawful exercise of self-defense may be a different situation. From what I've heard, and I've heard some wonderful material, it's been a great conference. But I've not heard an answer that makes me think we're going to win this fight, and that leaves me frightened. I'll not stay and participate in the debate. I apologize. I've tried to stay out of this one, but when John dragged me in by saying, by the way, he believes in legalizing this stuff, I thought I ought to say something.

DR. MOORE: I have two others on the list here, but I can't resist one comment, Bob, before doing that. That I think it's a very easy target in my judgment to say that the real problem is nothing but demand, and it is really the evil American people who are taking drugs. I think the reality, Bob, is that there is a double-barreled problem on this. It requires someone to supply it. It requires someone to take it. It's both sides. Any effort to deal seriously with drugs has to have a supply side component and a demand side component.

DR. TURNER: I think that you're right.

DR. MOORE: There is no magic bullet. I think it is an enormous mistake to try to focus the whole thing either on demand side or on supply side or try to allocate blame. The only blame in terms of the

setting, in terms of governmental setting, is when you get governments that are, in fact, not committed to the fight against this, and are, in fact, abetting it. The Cuban government involvement is one we ought to talk about in the worst kind of blame. The Colombian government is doing its damndest to fight this thing. The United States government is doing its damndest to fight this thing.

DR. TURNER: I'm not sure that's true.

DR. MOORE: Well, there's a lot more, I think, we can do, and I think all of us are in agreement of that at this conference. But there is not some kind of total moral lapse on the part of the American people, *etcetera*, in trying to deal with this issue. But I would argue very strongly that the effort simply to deal with it on either the demand side or the supply side alone is a major mistake. You've got to deal with it on both sides.

DR. TURNER: Let me concede on that, John, and say you're right, but we're neglecting the demand side, and that's important, too.

DR. MOORE: Well, I don't know that we are. This whole conference focused on it, and we have never, for example, decided that organized crime on the supply side should be something we would not focus on. All we would do is work on the demand side, for example, of other kinds of organized crime issues in this setting.

DR. MOORE: This gentleman here.

MR. APPLE: My name is James Apple. I'm counsel with the Federal Judicial Center here in Washington. I want to maybe focus away from the cultural aspects of the problem and discuss briefly one idea that was thrown out by you, Professor Moore, and perhaps some others, and that is one method of control using our civil liability system. I was just speculating as you made those remarks about what would happen, for instance, if we made corporations and banking institutions liable, imposed civil liability on them if it was disclosed through the imaginative discovery by our trial lawyers of America that they were engaged in some kind of drug activities or that the banking institutions were engaged in money laundering?

That kind of statute would send shivers through the general counsels of the corporations and banking institutions of this country. I think that statutes like that or ideas like that would begin to focus the corporate power of this country on this problem because it would be affecting their wallets and their pocketbooks and their profits. To carry that one step further, I could imagine some kind of system where even countries who are engaging in drug activities or not controlling them sufficiently would expose their assets in the United States to seizure by

some civil litigation process.

I think those kinds of legislation, if it were possible, would begin to focus on the problem in such a way that the corporate powers of this country would soon realize that it's a problem worth discussing.

DR. MOORE: Let's just build on that for a moment, if I could, and I'm going to draft someone for a moment from the audience, too, who has, I think, some unique information about this. I'm wondering, David Brink, as our past president of the ABA, has the ABA really looked into a way in which we could mobilize the considerable talents of lawyers in the United States in trying to devise innovative national and international laws that can try to combat some of this. Has the ABA, and there is no reason to pick on the ABA, but the ABA is one that has the potential here, I think, to mobilize this in a unique way that I think almost no other organization in the country does, at any time had some kind of blue ribbon presidential task force on the drug problem? Do you think that it might be useful if something of that sort were to be put together that would really innovatively look at new ideas, et cetera?

MR. BRINK: I think it would be very useful. I do not think that we have had a task force to design a total program. President Shovan [sic], the outgoing president of this last year, did have a program which, I think, was quite helpful in the schools. He went into the schools in company with the president of the AMA and they pointed out known consequences from a medical point of view and known problems from a legal point of view.

While that did not deal with these international problems of interdiction and the like, it certainly served some educational function on the primary level in the demand side, which I think is so important however you come out on the issue of drugs on demand or any of these other issues. The demand side, they're both important, but the demand side is the most important. If there were no demands, then we would have no supply problem. And conversely, as this gentleman has pointed out, if we expend all of our efforts and are able to shut off the Andean connection completely, some chemist will come up with something that comes from Minneapolis or somewhere else because there will always be an answer to the supply as long as there is a demand.

However, back to your original point, I do think that the ABA could tackle this. I'm not sure everyone would then be satisfied with the result, but I think maybe the precedent started by President Shovan would be pretty good because the involvement of the medical profession to quantify whatever tests, remedies, chemistry, if you will, may be in-

volved and to put that into the solutions, might well be helpful. Perhaps a joint project.

DR. MOORE: Very helpful. I must say I'm very intrigued with the possibility of some of our best legal minds being brought together to look at innovative new proposals to try to make it more difficult for this trafficking to go forward. I had this gentleman and this one back here, then the lady.

MAJOR PREGENT: Sir, I'm Dick Pregent from the Office of the Judge Advocate General, U.S. Army. One comment I would like to hear is your response to the idea that Mr. McGinnis proposed, but before getting there, the title of the conference is "Strengthening the Rule of Law in the War Against Drugs and Narco-Terrorism." And it seems that the majority of the speakers have focused on the importance of international cooperation. At the same time, I've heard some extremely powerful people express ideas about unilateral action which are confusing and to some extent disquieting.

The idea of Mr. Barr's opinion and to some extent what Judge Sofaer had to say, but specifically with regard to Mr. McGinnis, do you buy off on the concept, Sir, of expanding the definition of attack to include justifying self-defense or collective self-defense to include the failure of the state, which is not supporting narco-terrorism or drug trafficking, but is simply failing in its effort to suppress it? Do you support that expanded definition of attacks, or do you think the international community would buy off on it? I would be amazed to hear how South American countries and Latin American countries would perceive this authority of the United States to reach out and touch?

DR. MOORE: Let me respond to that, not because this is something I proposed or have my heart in, by saying initially I think it's an incredibly peripheral issue. This is not the core of how we're going to deal effectively in my judgment with international narcotics trafficking. What I can talk about a little bit is something I spent a lot of time on which is the whole theoretical basis of individual and collective defense and aggression under the United Nations Charter. The starting point is that there is a debate among scholars in interpreting the scope of the defensive right in international law.

There is a large group, indeed by far the largest, that would include most scholars, most foreign offices, from virtually every country in the world other than the United States, that would take the view that the kind of attack which is contemplated for a response is the use of military force, the use of the military instrument. There is, however, in the United States at least a group of scholars, Professor Myres Mc-

Dougal would certainly be among them, who would take the position that what is really at stake here and what one really looks to in the scope of aggression is coercion from the territory of a state that is sufficiently intense as to give rise to expectations that in the absence of the use of the military instrument in response, that there is a very severe encroachment on territorial integrity and sovereignty, *etcetera*.

He has taken the position that economic coercion, for example, if intensive and extreme, and he doesn't mean peripheral kinds of things that are modest, but the degree of economic coercion that, in fact, is let's say ending the ability of a whole people to operate and threatening the starvation of the peoples of a country. That gives right to the rise of use of the military instrument in response.

I think that there is, and there have been a number of scholars that have written in support of that position, for example, in relation to the Arab embargo, the double oil shocks of the 1970s. I think there is a considerable policy argument in favor of that under the Charter of the United Nations if you take a purposive and functional approach. The thing that it's easy to be, that one has to be very careful about here, though, is shifting from a theoretical basis in saying, yes, it is possible to have certain kinds of things rise to an intensity that is sufficient, that the military force can be used in response, and then shifting to a conclusion that the ordinary setting in which a government is trying to some extent to stop drug trafficking from its territory and is not able to do it gives rise automatically to the use of military force.

I'm not sure of a single setting in the real world—I personally would not be able to find one that would justify the use of military force even if you accept the broader theoretical proposition in the case today. I would find it highly unusual, certainly that it would ever be applied in a setting where a country, the government itself is committed in the war against drugs. By the way, as a theoretical proposition, though, as you well know, in a setting even if a government were theoretically opposed to the use of its territory for attacks from insurgent groups, if it's the use of military force, and they're not effectively able to stop the insurgence groups from using their territory, you have a right of collective defense even against their consent to do it.

So it really does go back to that broader question. And I think that's just a debate, but after having gone into this whole theoretical discussion, let me just say when you really look at this, in the light of the reality and the facts in the world, I don't see a single case where that, it seems to me, is a serious issue in the real world. And for that reason, I can't find this a particularly important way of trying to re-

spond to this issue.

JUDGE DONOHUE: Just a response to somebody about the legalization of marijuana. Up in my area, the remark came out that they better legalize marijuana. Otherwise, we won't be able to get a judge, a federal Supreme Court judge or a state Supreme Court judge or any federal judge or state judge in about the next five to ten years when they ask them the question have you ever used drugs. And if they answer it, one of the law school deans told me, if they ever ask the students in his school, they'd all have to answer yes. So there won't be any judges if they use that question.

But going back to the real problem. For twenty-five years I was a judge, and I first met the drug situation back in 1965, and it emanated from the military. We have a military base next door to our place, and a corporal started the drug situation back there with codeine, codeine cough syrup. He started it in the high schools, passing it around to the kids, and they used to get codeine for a quick high for fifty cents. And that gradually escalated all the way up so we eventually became a major drug center, shall I say, in my area.

Thoughts started coming about how we should try to stall this or stop this. Judges originally started out sentencing people to jail for use of drugs, first offender. And the libertarians came out and thought that was too cruel, too hard. So they came out with what they call the rehab centers and that we should try rehabilitation and put people on probation. I remember a fellow, a strong drug user, who became a probation officer. He told me that the only reason he stopped using drugs was because he ran into a judge in Pittsburgh, Pennsylvania, who said to him, I'm going to give you a fifteen year suspended sentence for fifteen years. If you get caught using drugs again, you're going to do the fifteen years.

He said he got rehabilitated. He rehabilitated himself. I hate to say, I tried all sorts of programs, about everybody around, to try to find what the results were and what happened, and I came to one conclusion which is this. First of all, we have to start a program in the schools. We're trying to say no, the DARE program, just say no to drugs, but you have got to go a little further than just that. The kids now are changing from drugs. They're going back to cigarettes and tobacco. I hope you notice that. You notice we're finding eight and nine year old kids smoking. And back to that bad habit.

Now, we're going back to alcohol. Somebody said we legalized alcohol and that solved our problem. It didn't. All we did was create another problem. I mean what the hell? What's worse than an alco-

holic, and how tough it is for an alcoholic to get off the program? How tough it is for anybody to get away from cigarettes or smoking. It takes a lot of courage and a lot of gumption to do this. So we have got to start with the program, going back to the children in schools all the way through, either through using the medium, the television, and things like that and programs, and put them right in school with the best people we can get, the best teachers we can get, the best convincers we can get, to get out and start telling these students right in the classrooms that this is not good for you, you shouldn't use it, or at least weigh it before you do it.

Then we have got to start going back to the old property which some of you earlier alluded to in factors, we have got to start going back to respect, respect for people and property. We've forgotten that. Somebody said we're self-indulgent. We just want me. It's the me rule, the me rule. I'm going to take care of me first, and the hell with you. We have got to go back and start teaching some respect for people and property, and it's got to go back to the schools, and it's got to go back right into the families.

After I retired as a judge, I started a newspaper, and all I'm doing in my hometown is this thing, respect. I have what I call the empty game. I call it "excuse me, may I, please, thank you, you're welcome." Now simple little words, but let me tell you what's happened in one year in my community. I've got people saying those words. I've got people holding doors. I'm impressed down here in Washington. I walked around the streets. People say hello to me. I say hello back to them. My daughters tell me, I said to them it's amazing how Washington is so friendly. And she said, well, they're all people from out of town, they have no friends.

(Laughter.)

JUDGE DONOHUE: Now that's what my children tell me. But there's a lot to it, but we have got to go back to that. But now let me go back to the immediate past, which I think we have got to do about enforcement. We've been sitting on our duffs thinking rehabilitation is going to work, and it isn't. You can't pat people on the head and say, get on your way and go out to court, or if we send you to jail, we're going to send you in the front door and let you out the back door. You can push this down any way you want—but you have got to establish a national federal drug court, and basically we go out and if you want to do it, you have got to go out and staff it with a lot of retired judges.

(Laughter.)

JUDGE DONOHUE: They know how to put people in jail. They

don't want to come back and work because most judges, once you get away from the job, you say I don't want to go back and make decisions again. But bring them back in for a month, two months, three months, put them out in those—somebody mentioned using military camps. Put the courts in the military camps. And you got a jail right next to them that you can turn into a jail, and the jail is simple. People always say you have to put up big walls. All you've got to do is put up a fence. That's a jail. And most drug offenders are not violent people. They're drug users. They aren't violent people. All you've got to do is lock them up and say you get out of the habit and make it a drug-free environment, that's going to be your biggest problem.

But staff it with retired people, with retired judges and retired law men, so they work three months. For example, in Massachusetts we have a law for trafficking. It's a mandatory ten year jail sentence for trafficking in cocaine. In 1987, we had 800 arrests for trafficking in cocaine. We have eighty judges on the Superior Court to try the cases. Now to try a trafficking, with a mandatory case a lawyer has got to try it. He can't plea it unless they can make a deal to knock it down to a lower case, and if they try the mandatory drug case it's a ten year sentence. A lawyer has got to try the case. Otherwise, he's got a mal-practice suit when the guy goes away for ten years.

But to try a trafficking in cocaine case takes on the average of three to four weeks, and that's when everybody is working. So in Massachusetts, we have to take every one of our Superior Court judges for a whole year to try the 800 cases, and we still would have cases left over. They wouldn't do another bit of work. And that's why we've got to set up a special court, just handling drug cases. Now you could back it off if you want. The federal courts are backlogged the same way. They're horrible. All the courts all over the country are backlogged the same way. We put down hard sentences but you can't do that.

If you don't have the jails, they're going in the front door and out the back door. That's why I say take these military bases—somebody said Fort Dix is going to be closed—hell, you could turn that place and house 10,000 prisoners. You could keep them in company areas, small areas. You don't have to put them all in one big building. I went down to South Africa and watched how they ran a jail. All they do down there is they put three fences around a building. And they put dogs in between.

DR. MOORE: You're not citing this as a model for the United States now necessarily in how we set up our judicial system.

JUDGE DONOHUE: Well, I'll tell you what they said. They tell

me down in South Africa that crime dropped.

DR. MOORE: Well, we do have certain constitutional principles that are of fundamental importance in our system also--the whole question of how we treat people and some standards in doing that.

JUDGE DONOHUE: Oh, no question about it. I'm all for this.

DR. MOORE: I know that, Judge.

JUDGE DONOHUE: But I'm saying this thing here—I'm just saying how they run a jail. But the part I was going to go back and finish off with is this thing, and I'm done, and I've had enough to say, is if we don't establish a central federal drug court, a special federal drug court, forget the drug problem. We're never going to win if you're going to use the enforcement method. And I thank you kindly.

DR. MOORE: Judge, thank you very much, from the heart and very provocative.

(Applause.)

MS. BECKER: I'd like to make a comment, but not in regards to what he said.

DR. MOORE: Okay. Is there anyone that would like to respond to that? Go ahead.

MS. BECKER: My name is Donna Becker, and I'm a private attorney here in Washington, and I've been here for both days and listened to most of the speakers, and the first comment I'd like to direct is to the judge back there. He does have a hope of getting a judge who's never taken drugs. I've never taken drugs. I don't smoke. I don't drink. And I'm probably one of the younger people here. But there is some comments I would like to make, and it seems to me that a lot of the speakers don't seem to put the rule of law as the most important part of this conference.

I have heard a number of people who seem to feel that trampling the Constitution, shredding the Bill of Rights, is something that we should do without blinking. I don't agree. One person has suggested that he thinks that widespread drug testing is a good idea. I do not agree. If I applied for a job at any company that tried to submit me to drug tests, I would get up and leave, not because I'm a drug user because I'm not, but because it's a matter of dignity. And the same goes for protecting our rights and protecting international law.

If you treat people with dignity and maintain the value of our society and the rule of law, then you'll get it a lot faster than if you turn the place into a police state, and I thought that it was very important to make this point. Thanks.

DR. MOORE: Thank you very much. I think that's a very impor-

tant point indeed to remind us that one of the critical dimensions of the problem we're dealing with is, in fact, the full protection of something we as lawyers and we, more importantly in the democratic process hold as extraordinarily important, which are a set of guarantees relating to who we are and what we are and constitutionalism and the rule of law and the Bill of Rights. Those are things that are of great significance, great importance to us. They do interact with these problems.

Reasonable men and women may differ in the intersection of how some of these things interface and what the appropriate balance is, but we must never forget that those are very critical issues in front of us. Let me just make a comment. There really are a number of different ways in which the rule of law is relevant to this issue. One is precisely that. That on the one hand, we must not forget in the things we try to do that we set aside the basic guarantees of our own system and in any way be harmful and set a tradition that's harmful to that.

The second is in trying to mobilize the legal profession, to really get lawyers, as a group, to focus on this, and to say let's use our best legal brains, our best legal talent, to examine this problem, to expose them to the best experts on the nature of the problem from the supply side on one side all the way to the demand on the other, and say where are the pressure points in this system, in which new laws that are carefully crafted with appropriate processes might make a difference in the process.

Another is to call attention to how the rule of law itself is targeted in a very damaging, sinister way the kind of targeting, for example, that's going on against the rule of law in Colombia and Peru and Bolivia, to some extent, I suppose at this point. I'm less familiar with that. But that we learned from our luncheon speaker yesterday has already begun to creep over into the United States with the killing of judges and lawyers and prosecutors. That's something also that strikes at the very core of who we are and what we are in the overall process. So there are a number of respects where it seems to me the rule of law is very relevant as it intersects this subject matter.

Yes, the lady back here. And then Mr. Tragen again.

MS. NAGLE: Now, that we are talking about the rule of law, it struck me—last year I was talking with some of my professors down in Colombia, and the comment was that some lawyers up here from the United States have been going down to Colombia to learn a little bit about the culture, Spanish, and to learn about the rule of law, to be able to come back here and be able to defend those that are breaking the rule of law here in the United States by trafficking in drugs.

Now the whole purpose of this is trying to move lawyers to be aware of what is happening, and I think the whole purpose of this is to try to use the rule of law to corner those that are breaking it.

DR. MOORE: That's exactly right.

MS. NAGLE: So why don't we as lawyers try to have a whole movement around the United States, for the lawyers to be aware and say no, I'm not going to defend those that are breaking this rule of law that is threatening the future of the United States and to the whole world?

MS. BECKER: How do you know they're breaking it if they haven't been convicted? In this country, we're presumed innocent until proven guilty. You can't just point the finger and say that person is a drug dealer and then everybody abandons ship and leaves the person to their fate. That doesn't work.

MS. NAGLE: I'm talking about those Colombians, my fellow Colombians, that are caught *in flagrante*.

MS. BECKER: If they're caught *in flagrante*—

MS. NAGLE: I'm talking about those lawyers that already know and are aware of those that broke the law—

MS. BECKER: If they're caught *in flagrante*, there should be no trouble in convicting them according to the rule of law, but that's the whole point of what I was trying to say. You can't abandon the rule of law. The whole thing is the rule of law and drug addiction. If you abandon the Constitution, if you abandon international law, then what have you got left? Nothing. And if you abandon the rights of the accused, if you shred the sixth amendment, as Mr. Ratliff suggested, unfortunately yesterday, then you've got nothing.

(Laughter.)

MS. BECKER: You've got nothing. We do not have a leg to stand on, and then it becomes anarchy. So if you want to convict people, fine, convict them according to evidence, convict them according to rule of law. If they're caught *in flagrante*, it should be no problem to put them away. The fact that we have overcrowded jails would suggest that most people don't get off so easily. The fact that people want to turn all the abandoned military based into 10,000 person prisons—First of all, I don't think turning the United States into one big prison is a very good idea. Second of all, I don't think it is so easy for defendants to get off. It just simply is not.

If you abandon that, if you say, for example, that lawyers cannot accept money because it might be tainted with drugs, then you effectively eliminate the assistance of counsel to the accused. The whole

point of our legal system is to make sure that everyone's rights are protected, even the most venal people as well as innocent people. You can't say only innocent people deserve legal defense. Once you do, you've abandoned everything that any lawyer should ever believe in, and in this country, all lawyers are required to say that they will protect and defend the Constitution. If you do what you're suggesting, then that is to violate your oath as a lawyer.

MS. NAGLE: So get better prosecutors. But I do indeed know for a fact that in L.A. I have talked with many a police person, and they said we have caught people *in flagrante*, and they have been released.

MS. BECKER: It won't happen every time. It might happen here or there, but that's part of the imperfection of the system. I mean you just have to accept that.

DR. MOORE: Okay. Could I intervene for a moment because, in a sense, you're debating what I happen to agree with you is an important part, but a smaller part of the message that our judge from Peru was trying to give to us, which was to welcome the importance of trying to educate the bar in general about the nature of this problem. I think that she's absolutely right. I would share that. Someone from Peru knows uniquely how judges themselves and the rule of law is targeted in this overall process. But let me say the only point where I think for those of us that are lawyers in this that we would differ, and I would share this difference, is we cannot say that lawyers do not and that people don't have a right to defend and the lawyers can't do it.

What we're really trying to do in mobilizing the bar is to get the bar to look at new legal initiatives and ways of dealing with this problem effectively that will be able to get it under control. I mean unless we have the absolute perfect legal system by some kind of accident in dealing with this problem, most new problems that arise need laws to be tailored to deal with the setting. All we're proposing is that this is a setting where we really need to assemble some of the country's best experts to get them fully briefed from the experts on the nature of the problem, and to begin to look at innovative solutions in which law can fight back at what we have a lot of experience now in knowing can ultimately become targeting itself, an attack itself, terrorism itself, directed against the rule of law. But I would share your very important point again about the Bill of Rights protection that everyone has a right in such a case to be represented by counsel. Any other?

DR. MOORE: Thank you, Bill. David. Irving Tragen and then David Martin.

MR. TRAGEN: I would merely like to comment on this last dis-

cussion. I think, it is typical and symptomatic of the problem. We're dealing with a transnational criminal activity. We talked about supply and demand, and what makes this different. Both ends of the equation are controlled by the same people. When we begin dealing with the characteristics of this problem, whether you're dealing with the cartel in Medellin or the Mafia in New York or the Mafia in Italy, we get down to a basic characteristic: seventy to eighty percent of the cocaine trade is controlled by four or five cartels in Colombia.

We're not talking about free enterprise. We're talking about a controlled market. We're talking about interlocking directorates that go across national boundaries. We're dealing with something that looks like some of the James Bond movies. You remember Goldfinger. They were sitting around the table. There is every bit of evidence from materials we've got, we have enough evidence to show the degree of interrelationship. You sit down and talk to the people from Interpol, and they tell us that the Italian Mafia controls seventy to eighty percent of the worldwide traffic in heroin including much of the production in Mexico, Colombia, and Guatemala.

What we've really got is something very atypical under our penal law. We're dealing with something that is a mixture of the Sherman Antitrust type case and normal criminal activity. What I was trying to point out before is if you're talking about law enforcement, what are we really talking about? In a country like Peru, we're talking about how the police effectively deal with the problem of controlling production. And here I suggest that if anybody wants to analyze this phase of the police problem, there is an excellent book by Dr. Edmundo Morales called, "Cocaine: White Gold Rush in Peru," published in 1989 by the University of Arizona Press. It's a fascinating book.

On the cover is a PL-480 bag filled with coca leaf. It explains the sociological environment in which illicit trafficking occurs. Now the role of the police in that setting is very different from what it has to be, say, on the streets of Lima where on most street corners you can get a joint of bazuka, which is the first stage of manufacturing cocaine, for less than you pay for a normal cigarette. Then, there is a different police role in interdicting, the movement of the cocaine under the control of the Medellin or Cali cartels from Peru to Colombia.

Now I think it's true that almost all of the shipment from Peru and Bolivia are controlled by the cartels of Medellin. There is very little indigenous control of the second stage of movement that is after the initial production by anyone but the Colombian organizations. So we've got an integrated monopoly. Then we get down, they move into

Colombia, and you've got another question then. You've got the question of the control of chemicals that are required to convert the cocaine, the coca leaf into cocaine. You've got another whole area of criminology that has to be dealt with. Then you get into interdiction again. Then you're into money laundering, and then you get into a whole range of highly sophisticated police techniques, and finally you're into what our colleague over here mentioned, getting the evidence, together.

I'm sure the judge from Colombia can verify that the most difficult problem she had as a judge was getting her hands on the evidence, partly because the police aren't trained to collect the evidence and partly because they're afraid to keep the evidence. In other words, what I'm trying to say is we're dealing with a transnational criminal activity controlled by an interlocking directorate. So it really isn't supply and demand in traditional terms. We have the same people controlling supply and promoting demand. And under those circumstances, the challenge, I think, to us as lawyers is to begin to look at the problem in different terms, analyze the dimensions, and then see to what degree we can begin, not working with ourselves alone, but with all the other countries in this chain.

Let's take a country like Bahamas which started out merely as a transient point, and probably today has the highest incidence of drug abuse, of drug use, cocaine use, in the world. Why is that? Because when they identify a corruptible official, they pay him once or twice in cash, and then they pay him in kind, and once you've established he's an SOB, who the hell cares? He isn't concerned about what he's doing. He's interested in the money. So you get these sociological human consequences coming out of this activity. What I'm suggesting really is we've got a package that in international penal law offers us one of the unique opportunities to be pioneers in examining a whole range of issues.

That's what I'd like to end with as my contribution because I think it ties together this last debate that we had because we don't want to violate the rules of law, but what we've got to do is understand the nature of the crime, the felony, that we're dealing with.

DR. MOORE: What I would like to ask you as perhaps our best expert on the real facts of this syndrome and problem, is what would be the most helpful way for lawyer groups in the United States and Latin America to be working together on this? Because I also personally share your sense that notions of blame or anything else are useless. We're in this thing together, and what we really need is for the top

levels of the bar and from Latin America and the OAS and top levels in the United States to be working very closely together to see how we mutually handle the problem. Are there possibilities here that the Inter-American Bar Association might take the lead or the OAS? Should the American Bar Association take the lead? Should private organizations seek to bring the two groups together and promote discussions that might be fruitful in this area? What do you think would be most helpful?

MR. TRAGEN: I want to start by saying I don't think the answer is exclusively one thing or another. I think we have different levels. At the OAS in the Inter-American Drug Abuse Control Commission (CICAD), as I explained yesterday, we have taken what we have called legal development one of our two or three top priorities. What we have done is we've brought together representatives of attorney generals, ministers of justice, from all of the member countries at that point. We had eleven member countries in CICAD, and we brought three or four more. Other countries were also represented. Now we have 22 countries that participate actively in CICAD, ranging from Canada to Argentina.

What we did was to bring them together and we said, look, what is it, how is it that we ought to focus on the problem, and obviously we can't do everything. They said the first thing we need to do is begin to get some legal standards common to all of us. What are the five or six areas that you gentlemen consider to be the most important? The first one they mentioned was the precursor chemicals because if we can cut that off, you stop the manufacture of coca leaf into cocaine, *etcetera*, and you stop the production of poppy into heroin, and you can stop the production of cannabis into marijuana.

Now this is very important because the U.S. is the largest producer of the chemicals. Mexico produces some. Canada produces some. Brazil produces some. CICAD convened a group of eleven inter-American experts from Canada to Argentina to develop rules and regulations. They took as their judicial framework, as I pointed out before, Articles twelve and thirteen, of the 1988 U.N. convention, and we designed a model regulation, which we are now working with countries to try to get applied. This is one level.

Now we are going through a similar exercise in money laundering and bank secrecy. These have to be dealt with by representatives of governments. That's one area in which government to government, in the OAS, really is the best inter-American instrument for this process.

Then we have another whole area that we haven't really looked at

which is judicial cooperation. As I think Judge Luz Nagle knows very well, Latin American and U.S. legal systems are very different. I graduated from Boalt in 1945, and I went to Chile to get my master's, and the first thing I had to do was unlearn much of the way in which courts proceed, many of the principles of our law go back to code law as distinct from, I remember I studied under Max Radin, when we were dealing with Roman law, and to go back to a whole new mind-set.

We've got to get judges talking to judges. We've got to begin to understand how their systems work, and we've got to begin to understand how we can begin to work together. If I were a judge in Colombia, not understanding the U.S. system, and I received a request for extradition, my instinct would be to say that doesn't look like an order that would come out of my court. It isn't done the same way. So I think one of the great things that the Inter-American Bar and the American Bar can do working with our Latin American colleagues is begin a dialogue outside of government among the principal leaders in jurisprudential thinking in the hemisphere and see how we can focus on these issues.

Fortunately, we have a great ally in the Italians, and they have a great school at Syracuse dealing with penal law, and I think we might find a way of building this tripartite relationship, Europe, the United States, Latin America, to begin to open up some dialogue. I think this is a very important part of this equation and not merely limited to the drug problem, but it would probably have a favorable impact on other elements of penal law as well as civil law.

I think a third party that we need to do is in terms of a different kind of exchange among legislators. We now have the inter-parliamentary fora and we have parliamentary groups from the U.S. that go to Latin America. They have the Latin American parliamentary forum. They have the Andean parliament forum. But we really haven't structured many of these things to get legislators to begin to talk to legislators with a different kind of setting.

I remember that there is an AID program aimed at—I don't know what they're calling it now—modernizing the judicial system or modernizing legislation. You can't use those words. We aren't modernizing. We're helping them to examine, as maybe we need to examine, some of the systems and processes we use. I think we could go on, but what I really believe is once again you disaggregate and you begin to identify different instruments for different purposes. I think you know from your many years of experience within the U.S. executive branch, there's a tendency to want simple, general answers, and they want to

put it all on one sheet of paper, and that doesn't really lend itself to the kind of thinking that we need to do.

I think if you start disaggregating what the issues are, then I think you can find a lot of different tools to use and maybe it ought to be the ABA that takes the lead in creating that kind of consortium view of the resources that we have available to do it.

Let me close by referring to an experience I had. As the AID Director in Bolivia in 1966 when Chief Justice Warren came to Bolivia, my first political experience had been ringing doorbells for him when he was running for governor in the mid-'40s. I was quite overwhelmed to have the Chief Justice of the United States as my charge in Bolivia. What I found was that by introducing a question here and a question there, a debate could be started, a discussion could be started, between the Chief Justice of the Bolivian Supreme Court and the Chief Justice of the U.S. Supreme Court, and they began to see how totally different their systems were. And that's part of what we have to do. But, if we're going to bridge the gap in this interdependent world dealing with this transnational kind of problem, then we've got to begin to understand what it is we're talking about.

DR. MOORE: Thank you. That was very helpful indeed.

(Applause.)

DR. MOORE: I'm going to take David Martin as the last question here. Yes, Sir. This gentleman will be the real last question. I tell you that. We'll take you now, and then I'll take David as the last question.

MR. WHITLOCK: Thank you, Professor Moore. I'm Bill Whitlock. Two things. I wanted to make an observation just to underscore what Mr. Tragen was saying. At lunch, Congressman Smith observed that he did not think that we were quite turning the corner, and I agree. In order to turn the corner we must get to a situation where we experience control. I think intrinsic to everything you were saying and some of the other observations is we cannot be too specific. When we want to get control, we get very specific in all your points which is whatever circle we're in, whatever opportunities we may have to address the problems, if we can be very specific when we address them and those fourteen points that you observed or set out as a challenge or suggestion to us earlier today, Professor Moore, every one of those elements gave us an opportunity to be very specific in our circle, and to say how best can we deal with it.

Once we get specific, we have control. Once we get a sense of control we start to be able to turn the corner, and that's, I think, what we're trying to do. If I may, just a brief report. Earlier I mentioned to

Professor Moore that I was down at the FIPSE, the Fund for the Improvement of Post-Secondary Education, and I thought it might be of interest to the conferees to know that the Department of Education is seeking proposals for a program entitled "Approaches to Accountability in Prevention Programs, Drug Prevention Programs at Higher Education," and they are seeking proposals. Their focus is on promising new theoretical approaches to the individual and institutional leadership and responsibility and encouraging the formulation of new theoretical ideas.

It's about fourteen or fifteen small grants, but it's an effort on the Department of Education—there are other projects that they have in the works—and back home or with some of your educational institutions, if it was something that you thought you wanted to pass on, you might want to suggest that they contact the Fund for Improvement of Post-Secondary Education, the Department of Education. Thank you very much.

DR. MOORE: Thank you very much. David Martin is our final speaker, final participant.

MR. MARTIN: I have one comment I want to make and one proposal. The comment has to do with Bob Turner's definition of the libertarian attitude. If people want to smoke, let them smoke. Well, I always believed that the heart of libertarian philosophy had to do with the right of the individual to decide for himself. This is the situation where you run into certain contradictions. You give people the right to decide whether they will indulge in narcotics or not, and in effect, if they decide the wrong way, you are denying them of the right to make a free choice, a choice of their own for the rest of their lives.

They become slaves thereafter of the particular drug they imbibed when they made this faulty decision. Certainly if they realized what would happen, they would not have done it. So I don't think freedom of choice can be considered as an absolute value in covering all cases, certainly not where the freedom of choice may be stripped from the individual for the rest of his intellectual life.

Then I spoke yesterday about the hearings on marijuana which I organized and conducted. And about the almost universal opinion of the experts who testified that one of the effects of marijuana was that it interfered with the process of maturation so that it affected young addicts who had been marijuana addicts perhaps more than two or three years. These were the critical years of their adolescence. They never matured. The doctor who headed up the Phoenix House in New York, which was the biggest national rehabilitation institute, Mitch Rosen-

thal, told us that he was very afraid that if we failed to stem the marijuana epidemic, we would find ourselves confronted not in the far distant future, but in the very near future, with a large population of young adults who had never matured and who would have to be in the society one way or another for the rest of their lives.

This evidence, as I say, was confirmed by the other experts who testified. Now there is such a thing as the crime of genocide, and if one believes that the punishment should bear some relationship to the gravity or scope of the crime, then obviously the crime of genocide deserves the maximum possible punishment. We have in the case of narcotic trafficking a crime which I believe is equivalent to the crime of genocide. It is a crime *sui generis*, as one might say, compared with other crimes for which people are sentenced to long terms in prison. It qualifies as genocide because every year at least several thousand people, possibly as many as 10,000, are killed in the United States as a result of narcotics overdoses, and much more important than that is it qualifies, in my opinion, as a crime of genocidal magnitude because it destroys human capacities and human abilities to make free judgments, judgments that reflect the personality, the true personality of the person who is making them.

I believe that if the expression genocide has validity, then there should be such a thing as narco-genocide as a crime punishable by death. So in this one case, I am certainly in favor of the enactment of legislation that would qualify narco-genocide, establish it as a crime, punishable by the death sentence. That's my proposal.

DR. MOORE: David, thank you very much for a very interesting proposal, and provocative new title to be attached to some of this behavior. I would like to thank all of our participants and experts who participated in the whole program, joined in the discussion with us. We are much indebted to you, and I certainly learned a great deal out of this, and hope that we'll be able to distribute some of these materials more widely, and if so, that it will make a contribution in dealing with this problem. So we are dismissed, and thank you very much.

(Whereupon, at 4:00 p.m., the meeting adjourned.)